# (22,278.)

# SUPREME COURT OF THE UNITED STATES.

**OCTOBER TERM, 1910.**

## No. 657.

THE CHESAPEAKE & OHIO RAILWAY COMPANY, PLAINTIFF IN ERROR,

*vs.*

W. G. CONLEY, ATTORNEY GENERAL OF THE STATE OF WEST VIRGINIA, ET AL.

IN ERROR TO THE SUPREME COURT OF APPEALS OF THE STATE OF WEST VIRGINIA.

**INDEX.**


| | Original. | Print |
|---|---|---|
| Caption | 1 | 1 |
| Order of supreme court of appeals refusing appeal | 2 | 1 |
| Petition for appeal | 4 | 1 |
| Record in circuit court of Kanawha county | 8 | 4 |
| Order filing bill | 8 | 4 |
| Bill of complaint | 9 | 5 |
| Order awarding injunction | 33 | 20 |
| Motion to dismiss | 36 | 22 |
| Demurrer to bill | 37 | 23 |
| Final order or decree | 40 | 25 |
| Answer | 42 | 27 |
| Exceptions to answer | 64 | 41 |
| Demurrer to answer | 67 | 43 |
| Clerk's certificate | 69 | 44 |
| Order awarding writ of error from the Supreme Court of the United States | 70 | 45 |
| Clerk's certificate to transcript | 72 | 45 |
| Petition for writ of error | 73 | 46 |
| Assignment of errors | 75 | 47 |
| Allowance of writ of error | 78 | 48 |
| Bond on writ of error | 80 | 49 |
| Writ of error | 82 | 50 |
| Citation and acceptance | 84 | 51 |
| Return to writ of error | 87 | 52 |


JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., AUGUST 26, 1910.

1 & 2 RECORD.

STATE OF WEST VIRGINIA:

Pleas Before the Honorable Supreme Court of Appeals of the State of West Virginia on the 11th Day of July, 1910.

CHESAPEAKE & OHIO RAILWAY COMPANY
vs.
W. G. CONLEY, Attorney General of West Virginia, et als.

From the Circuit Court of Kanawha County.

Be it remembered that heretofore, to-wit, at a special term of the Supreme Court of Appeals this day held at Charleston, Kanawha County, the following order was made and entered, to-wit:

Present: Hon. Ira E. Robinson, President, Hon. Henry Brannon, Hon. George Poffenbarger, Hon. William N. Miller, Hon. L. Judson Williams.

CHESAPEAKE & OHIO RAILWAY COMPANY
vs.
W. G. CONLEY, Attorney General, et als.

This day came the Chesapeake & Ohio Railway Company, by Simms, Enslow, Fitzpatrick & Baker and W. E. Chilton, its attorneys, and presented to the Court a petition praying for an appeal from a decree of the Circuit Court of Kanawha County, pronounced on the 28th day of June, 1910, in a cause in which said petitioner was plaintiff and W. G. Conley, Attorney General, and others were defendants with a transcript of the record of the decree aforesaid accompanying the petition, which being seen and inspected by the Court, the appeal prayed for is refused, the Court being of opinion that the decree complained of is plainly right.

3 (The petition for appeal and transcript of record accompanying the same mentioned in the foregoing order are in the words and figures following, to-wit:)

4 In the Supreme Court of Appeals of West Virginia, Charleston.

THE CHESAPEAKE AND OHIO RAILWAY COMPANY, a Corporation,
vs.
W. G. CONLEY and Others.

*Petition.*

To the Honorable the Judges of the Supreme Court of Appeals of West Virginia:

Your petitioner, The Chesapeake and Ohio Railway Company, respectfully represents that it is aggrieved by a final decree entered

against it in the Circuit Court of Kanawha County, on the 28th day of June, 1910, in a chancery cause therein pending, in which it was plaintiff and W. G. Conley, S. B. Avis, and others, defendant-, A complete transcript of the record in the said cause is filed herewith as a part of this petition.

The facts in brief are as follows:

On the 26th day of May, 1909, The Chesapeake and Ohio Railway Company presented its bill to the Circuit Court of Kanawha County, praying that an injunction should be awarded restraining the Attorney General of the State of West Virginia and the Prosecuting Attorneys in the various counties through which its lines pass, from enforcing the provisions of the Act of the Legislature of west Virginia passed on the 20th day of February, 1907, which regulates the rate of fare to be charged by certain railways operating in the State of West Virginia. The bill was filed, summons issued, and the hearing upon the motion for an injunction set for the 22d day of June, 1909. At that time motion to dismiss the bill was overruled, and, as well, the demurrer, and the Court then proceeded to pass upon the constitutionality of the Act, holding that Chapter 41 of the Acts of 1907, commonly known as the "Two-cent Rate Act" was unconstitutional and void, and awarded the injunction prayed in accordance with the prayer of the bill. It was further provided in the decree that in the event the complainant, the Chesapeake and Ohio Railway Company, should put into effect upon its lines any rate in excess of that named in the Act of February 20th, 1907, that the passenger should be entitled to a coupon in order that should the action of the Circuit Court of Kanawha County be finally vacated the passenger so traveling would receive upon such coupon the difference between the fair paid by him and the two-cent rate fixed by the Act. The Chesapeake and Ohio Railway Company proceeded, in accordance with the right given it by this order, to charge upon its lines such fare as the cost of transportation of passengers necessitated in the State of West Virginia, and no step was taken by the parties defendant until the 28th day of June, 1910, when the defendants tendered their joint and several answer to the plaintiff's bill. The plaintiff objected to the filing of the answer, but the Court ordered it filed, and the plaintiff then filed its exception to the said answer, and also demurred, as will appear from pages sixty-eight, sixty-nine, seventy, seventy-one and seventy-two of the typewritten record. The Court overruled the exceptions and also the demurrer, and the case was then submitted upon bill and answer, with general replication, and upon the admission made by the defendants that there are railroads in the State of West Virginia under fifty miles in length and not a part of, or under the control, management, or operation of any other railroad over fifty miles in length, and that there are electric lines and street railways, and that as to all of these the provisions of the two-cent rate act are not applicable, (page 43 of the record).

Upon consideration of all of the matters set out in the order, which recites the fact that the Supreme Court of Appeals of West Virginia

has now decided that Chapter 41 of the Acts of the Legislature of West Virginia of 1907 is constitutional and valid, the Court dissolved the injunction and dismissed the bill, and ordered that coupons issued under the order of June 22d, 1909, should be redeemable at Charleston, Huntington and Hinton.

Your petitioner now alleges that the Circuit Court of Kanawha County, in entering the decree of June 28th, 1910, erred in the following particulars to the prejudice of the plaintiff and this petitioner:

First. It was error to allow the joint and separate answer of the defendants to the plaintiff's bill to be filed, Chapter 41 of the Acts of 1907 being unconstitutional and void, and contrary to Article Fourteen of the Amendments to the Constitution of the United States.

Second. It was error to overrule the exceptions to the said answer, and to refuse to strike the same from the files, the said answer showing upon its face that the act therein set out as Chapter 41 of the Acts of 1907 of the Legislature of West Virginia imposed burdens and restructions upon interstate commerce.

Third. It was error to overrule the demurrer to the defendants' answer, the said answer being based upon an unconstitutional act, that is to say, Chapter 41 of the Acts of 1907, and contrary to Article Fourteen of the Amendments to the Constitution of the United States.

Fourth. It was error to dissolve the injunction awarded on the 22d day of June, 1909, and to dismiss the plaintiff's bill.

Fifth. It was error to provide that to the holder, coupons issued under the order of the 22d day of June, 1909, should be re-
7 deemable at Charleston, Huntington and Hinton, without limitation of time.

Sixth. For other errors apparent upon the face of the record.

Your petitioner therefore prays that an appeal be granted it to the said final decree of June 28th, 1910, and that the said decree may be reviewed and reversed, and such other further and general relief may be granted as to equity may seem fit and the case require, and it will ever pray.

THE CHESAPEAKE AND OHIO RAILWAY COMPANY, *By Counsel.*

SIMMS, ENSLOW, FITZPATRICK & BAKER,
W. E. CHILTON, *Solicitors.*

STATE OF WEST VIRGINIA,
*County of Cabell:*

I, Herbert Fitzpatrick, a practising attorney in the Supreme Court of Appeals of West Virginia, do certify that in my opinion the petitioner is entitled to an appeal in the above cause, and that there is error, therein as set out.

Done this 9th day of July, 1910.

HERBERT FITZPATRICK.

8 *Record.*

In Chancery. No. 2139.

CHESAPEAKE & OHIO RAILWAY COMPANY, a Corporation,

vs.

W. G. CONLEY, Att'y Gen.; S. B. AVIS, C. L. ESTEP, JEAN F. SMITH, George Love, J. S. McWhorter, R. D. Steed, E. H. Green, R. L. Keadle, S. R. King, F. R. Hill, C. C. Knapp, Hugh A. Dunn, T. N. Read, and D. B. Hardwick, Prosecuting Attorneys of Various Counties.

(Pleas Before the Judge of the Circuit Court for the County of Kanawha, Held at the Court House Thereof on the 28th Day of June, 1910.)

Be it remembered that heretofore, to-wit, at a Circuit Court for Kanawha County, held at the Court House thereof, on the 26th day of May, 1909:

In Chancery.

THE CHESAPEAKE & OHIO RAILWAY, a Virginia Corporation,

vs.

W. G. CONLEY, Attorney General of State of West Virginia, and S. B. AVIS, Prosecuting Attorney of Kanawha County, et al.

This day came the plaintiff by H. T. Wickham and Simms, Enslow, Fitzpatrick and Baker, its attorneys, and tendered in open court its bill of complaint against W. G. Conley, Attorney General of the State of West Virginia, S. B. Avis, Prosecuting Attorney of Kanawha County, C. L. Estep of Boone County, Jean F. Smith of Cabell County, George Love of Fayette County, J. S. McWhorter of Greenbrier County, R. G. Steed of Lincoln County, E. H. Green of Logan County, R. L. Keadle of Monroe County, S. R. King of Nicholas County, F. R. Hill of Pocahontas County, C. C. Knapp of Putnam, Hugh A. Dunn of Raleigh, T. N. Read of Summers and D. B. Hardwick of Logan County; and among other relief, asked for an injunction to be awarded restraining the defendants from

9 enforcing the provisions of the Act of the Legislature of West Virginia passed on the 20th day of February, 1907, regulating the rate of fare to be charged and collected by railways operating in the State of West Virginia, in consideration of which the Court orders said bill to be filed, and directs the Clerk of this Court to issue summons against the defendants therein named, returnable to June 1909 Rules, of Kanawha County Circuit Court. And this case is remanded to Rules for further proceedings thereon, but the Court not being fully advised as to the awarding of an injunction as prayed for at this time, the hearing upon the motion for an injunction, as prayed for in said bill, is set for a future day to be fixed by this Court.

(The Bill referred to in the foregoing order is in the words and figures following, to-wit:)

In the Circuit Court of the County of Kanawha, State of West Virginia.

The Bill of Complaint of the Chesapeake and Ohio Railway Company, a Corporation Organized and Existing under the Laws of the State of Virginia and a Citizen and Resident of said State, Doing Business in the State of West Virginia Pursuant to the Statutes Thereof in Such Cases Made and Provided, Against W. G. Conley and Others, Citizens and Residents of said State of West Virginia.

To the honorable judge of the Circuit Court of the County of Kanawha:

The Complainant, The Chesapeake and Ohio Railway Company, brings this, its bill of complaint, against W. G. Conley, Attorney General of the State of West Virginia, S. B. Avis, C. L. Estep, Jean F. Smith, George Love, J. S. McWhorter, R. G. Steed, E. H. Green, R. L. Keadle, S. R. King, F. R. Hill, C. C. Knapp, Hugh A. Dunn, T. N. Read and D. B. Hardwick, who are prosecuting and County Attorneys of the various counties, through which the Chesapeake & Ohio Railway line is operated, that is to say Kanawha, Boone, Cabell, Fayette, Greenbrier, Lincoln, Logan, Monroe, Nicholas, Pocahontas, Putnam, Raleigh, Summers and Wayne Counties, West Virginia; and respectfully shows unto this Honorable Court as follows:

First. That it owns and operates a system of railroad in the States of Virginia, West Virginia, Kentucky and Ohio, aggregating in main line and branches as of June 30, 1908, a total track mileage of 1840.3 miles, of which mileage

| | | |
|---|---|---|
| It owns | 1618.2 | miles |
| Operates through a practical total stock ownershp | 1.8 | " |
| Operates under lease | 20.8 | " |
| Operates jointly under trackage contracts | 200.5 | " |

That its total mileage in West Virginia is (main line) 205.39 miles, and in addition thereto second track aggregating 164.90 miles; branch lines 335.30 miles; sidings 246.7 miles; that its total main line and branches aggregate 540.69 miles, located in the several counties of West Virginia as follows:

| | County. | Main track. Miles. | Second track. Miles. | Branches. Miles. | Sidings. Miles. |
|---|---|---|---|---|---|
| Main Line | Greenbrier | 26.70 | 24.68 | ..... | 10.51 |
| " | Monroe | 3.47 | 3.47 | ..... | 1.37 |
| " | Summers | 33.27 | 31.40 | ..... | 16.10 |
| " | Fayette | 56.95 | 49.19 | ..... | 36.01 |
| " | Kanawha | 40.67 | 38.11 | ..... | 41.70 |
| " | Putnam | 12.49 | ..... | ..... | 3.70 |
| " | Cabell | 26.13 | 12.34 | ..... | 35.18 |
| " | Wayne | 5.71 | 5.71 | ..... | 1.15 |
| Greenbrier Branch | Greenbrier | ..... | ..... | 35.00 | 4.82 |
| " " | Pocahontas | ..... | ..... | 65.81 | 11.09 |
| Loup Creek Branch | Fayette | ..... | ..... | 9.89 | 12.35 |
| White Oak Branch | Fayette | ..... | ..... | 3.60 | 5.10 |
| South Side Branch | Fayette | ..... | ..... | 7.76 | 6.55 |
| Keeneys Creek Branch | Fayette | ..... | ..... | 7.82 | 2.97 |
| Hawks Nest Branch | Fayette | ..... | ..... | 3.38 | 2.01 |
| Gauley Branch | Fayette | ..... | ..... | 7.15 | 1.99 |
| " " | Nichols | ..... | ..... | 10.54 | .47 |
| Laurel Creek Branch | Fayette | ..... | ..... | 5.50 | 3.99 |
| Piney Creek Branch | Fayette | ..... | ..... | .30 | |
| " " | Raleigh | ..... | ..... | 28.60 | 9.58 |
| Powellton Branch | Fayette | ..... | ..... | 8.00 | 4.03 |
| Rend Branch | Fayette | ..... | ..... | 4.60 | 1.95 |
| Paint Creek Branch | Fayette | ..... | ..... | 6.86 | .50 |
| " " | Kanawha | ..... | ..... | 14.05 | 5.97 |
| Cabin Creek Branch | Raleigh | ..... | ..... | 7.94 | .49 |
| " " | Kanawha | ..... | ..... | 29.95 | 17.23 |
| " " | Boone | ..... | ..... | 6.95 | .19 |
| Guyandotte Valley Branch | Cabell | ..... | ..... | 15.53 | 1.44 |
| " " | Lincoln | ..... | ..... | 32.97 | 4.24 |
| " " | Logan | ..... | ..... | 23.10 | 4.02 |
| Totals | | 205.39 | 164.90 | 335.30 | 246.70 |

and that it owns the same, with the exception of the Keeneys Creek Branch above mentioned, seven and eighty-two hundredths (7.82) miles in length, which it leases.

Second. Complainant states that as of the 30th June, 1908, the actual cost to it of its railway system, exclusive of equipment, was not less than One Hundred and Thirty-eight Million, Two Hundred and Ninety-five Thousand, One Hundred and Thirty-six Dollars and Two Cents ($138,295,136.02); that its entire property in West Virginia is in a mountainous region with an exceptionally large number of cuts, fills and tunnels; that the said railways were honestly and economically operated, but that the expenses of construction and operation were and are especially great in the State of West Virginia owing to the geographical formation of the region and to the liability to slides, wash-outs and physical interruptions to train service thereby occasioned.

Complainant further states that as of the 30th of June,
12 1908, the actual cost to it of its equipment owned was Fourteen Million, Four Hundred and Seventeen Thousand, Five Hundred and Eight Dollars and Forty-five Cents ($14,417,508.45), in addition to which it has equipment covered by car trust agreements to the extent of Fourteen Million, Four Hundred and Twenty Thousand Dollars ($14,420,000.00).

Third. That on said 30th day of June, 1908, this complainant had outstanding upon its system capital stock aggregating Sixty-two Million ($62,799,100.00); and bonded debt, including Equipment Trust certificates, aggregating One Hundred and Fourteen Million, One Hundred and Eighty-eight Thousand Dollars ($114,188,000.00).

Fourth. That on the 20th day of February, 1907, the Legislature of West Virginia passed an Act in the words and figures following, to-wit:

"Be it Enacted by the Legislature of West Virginia:

SEC. 1. That all railroad corporations organized or doing business in this state under the laws or authority thereof shall be limited in their charges for the transportation of any person with ordinary baggage, not exceeding one hundred pounds in weight, to the sum of two cents per mile, or fractional part of a mile, but the fare shall always be made the multiple of five nearest reached by multiplying the rate by the distance, and if for any one passenger the rates herein provided shall be less than five cents, the said sum of five cents may be charged as a minimum; children under twelve years of age shall be carried for one-half fare above prescribed; provided, that any passenger boarding a train at a station where tickets are sold, without having procured a ticket, may be charged
13 an additional fare of ten cents, for which sum a rebate slip, redeemable in money, upon presentation to any ticket agent of the company, shall be issued and delivered to such passenger; provided, further, that nothing in this act shall apply to any railroad in this state under fifty miles in length and not a part of, or under the control, management or operation of any other railroad, over fifty miles in length operating wholly or in part in the state.

SEC. 2. Any railroad company which shall charge, demand or receive any greater compensation for the transportation of any passenger than is authorized by this act, shall be fined for each offense not less than fifty dollars nor more than five hundred dollars; provided, that nothing contained in this act shall apply to electric lines and street railways owned or operated in this state.

SEC. 3. All acts or parts of acts inconsistent herewith are hereby repealed."

Said act is chapter 41 of the Acts of 1907, and was approved by the Governor February 24th, 1907, and went into effect ninety days after its passage, to-wit, on the 21st day of May, 1907, and said statute has never been repealed by the Legislature of West Virginia.

That prior to the passage of said act limiting passenger fares to two cents per mile this complainant had been charging, as it might lawfully do, about three cents per mile or fraction of a mile for the transportation of passengers with ordinary baggage, which said sum this complainant avers was a reasonable and not excessive charge for the service rendered by it.

Nevertheless, this complainant in good faith did immediately observe and fully comply with the said statute of the State and has conformed entirely to its provisions, and has not charged and is not charging more than two cents per mile or fraction of a mile

for carrying passengers over its lines within the said State
14 of West Virginia, but, from the time the said act went into effect, to-wit, on the 21st day of May, 1907, down to the present time, a period of upwards of two years, this complainant has in good faith submitted to the actual application of the rates prescribed by the law, notwithstanding the serious and material effect which it has had and is having, and which will be hereinafter shown more fully in detail.

Fifth. That the effect of the application of the said maximum rate of two cents per mile has been to materially and greatly reduce the rate of toll established by this complainant theretofore; and has seriously and materially decreased its earnings from passenger fares since the said 21st day of May, 1907, and complainant avers that if it had been permitted to charge its lawfully established rates theretofore in effect it would have received from its passenger service greatly more than it has received under the operation of the two cent law; that there has been no compensatory increase in the passenger earnings from the reduced rates, which have not stimulated travel as was anticipated.

This complainant avers and charges that owing to and because of the said Act prescribing the maximum rate of two cents per mile, hereinbefore set forth, a direct loss of revenue has been caused to this complainant for the year ending 30th of June,, 1908, of not less than the sum of Three Hundred and Seventy-five Thousand, Seven Hundred and Three Dollars and Thirty-nine Cents ($375,703.39). And this complainant further avers and charges that owing to and because of said Act a further direct loss of revenue has been caused to it for the six months ending 31st of December, 1908, of not less than the sum of Two Hundred and Twenty-six Thousand One Hundred and Fifty-five Dollars and Forty-eight Cents ($226,-
15 155.48). And in addition thereto this complainant has sustained indirectly a still further loss because of the facility with which passengers can and do largely evade the requirements of the Interstate Commerce Act and the through rates by purchasing tickets to the local point and then using the ticket thus purchased as a part of a interstate journey, thereby securing interstate transportation at less than the established lawful rate under the interstate tariffs duly filed with the Interstate Commerce Commission and published and posted according to law.

Sixth. That this proceeding is a suit in equity brought by this complainant to redress the deprivation occasioned it by the said Act hereinbefore referred to of certain rights, privileges and immunities guaranteed to it under the Constitution of the United States, namely:

1. Sections 9 and 10 of Article 3 of the Constitution of West Virginia, which provide that "private property shall not be taken or damages for public use without just compensation," and that "no person shall be deprived of life, liberty or property without due process of law and a judgment of his peers."

2. Paragraph 3, Section 8 of Article 1 of the Constitution of the United States, providing that "the Congress shall have power—to regulate commerce with foreign nations and among the several states."

3. Section 1 of the Fourteenth Amendment to the Constitution of the United States, providing that "no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

And this complainant respectfully claims the benefit and
16 protection of the provisions of the Constitution of the State of West Virginia and said provisions of the Constitution of the United States and of the laws of the United States passed in pursuance thereof, and this respondent avers and charges that the amount in controversy in this cause, exclusive of interest and costs, exceeds greatly the sum of Five Hundred Thousand Dollars ($500,000.00).

Seventh. Your complainant further respectfully shows that the gross earnings of your complainant from all sources, both inter and intra-state, for the year ending June 30, 1908, in the State of West Virginia, were ..... $8,756,027.97

The operating expenses in the State of West Virginia for said year were ..... 6,225,863.29

Leaving net earnings from all sources in said State of West Virginia ..... $2,530,164.68

And showing a percentage of operating expenses to gross earnings of .....71.10

Your complainant further shows that its actual earnings from its passenger business for the said year ending June 30, 1908, wholly intra-state,—West Virginia, were ..... 819,172.94

That its intra-state West Virginia passenger expenses for said period were not less than. 705,307.90

So that the maximum net earnings from its said intra-state passenger traffic in West Virginia (arrived at by deducting from the gross intra-state passenger earnings in West Virginia the operating expenses incident to the carrying thereof, which is not less than 86.10 per cent.) were..... $113,865.04

with which to meet that proportion of taxes, expenditures reasonably necessary to keep the property up to standard and in proper condition to dis-

charge its duties as carrier; fixed charges and rentals; and some return upon the investment to the stockholders.

But intra-state passenger earnings in West Virginia should contribute to the payment of taxes properly allocable thereto as follows:

| | |
|---|---|
| Property tax (arrived at by prorating the total West Virginia property tax to intra-state West Virginia passenger earnings on the basis of the percentage which the gross intra-state West Virginia passenger earnings bear to the total gross earnings intra-state and inter-state West Virginia, to-wit, 9.35 per cent) | $26,588.60 |
| Leaving a balance of | 87,276.44 |

In like manner intra-state passenger earnings in West Virginia should contribute to the payment of such sums as are reasonably necessary to keep the property up to standard and in proper condition to discharge its duties as carrier in the same proportion.

| | |
|---|---|
| The expenditures reasonably necessary to keep the property up to standard and in proper condition to discharge its duties as carrier, not charged to capital account, prorated on the percentage of the intra-state passenger earnings to total gross earnings in West Virginia as aforesaid, to-wit, 9.35 per cent, as aforesaid, made by your complainant in the year ending June 30, 1908, were | $56,120.50 |
| Leaving a balance of with which to meet the payment of interest, rentals and returns on the capital invested. | 31,155.94 |

| | | |
|---|---|---|
| The total bonded indebtedness of your complainant as of the 30th of June, 1908, was as aforesaid | | 114,188,000.00 |
| Of which there was allocable to the State of West Virginia on the basis of miles operated the sum of not less than | | 33,537,244.00 |
| On which the annual interest charge is | 1,402,706.09 | |
| 18 | | |
| And the annual trackage and rentals paid by this complainant in West Virginia amount to | 18,464.46 | |
| Total interest, trackage and rental applicable to West Virginia | 1,421,170.55 | |
| But intra-state passenger earnings in West Virginia should contribute to the payment of said interests, trackage and rentals on the percentage of said intrastate passenger earnings for the year ending June 30, 1908, to total gross earnings in West Virginia for said year (to-wit, 9.35 per cent, as aforesaid) the sum of | 132,879.45 | |
| Leaving, as compared with the maximum net intra-state passenger earnings in West Virginia of $113,865.04, as aforesaid, a deficit of | | $19,014.41 |

and leaving nothing whatsoever as its proportion towards the payment of taxes, expenditures necessary to keep the property up to standard or the return to the stockholders in the shape of dividends upon their investment. And leaving as compared with the maximum net intra-state passenger earnings in West Virginia, after the deduction of its proportion of taxes and expenses reasonably necessary to keep the property up to standard, a deficit of $101,723.51, resulting in nothing whatever as its proportion towards the return to the stockholders in the shape of dividends upon their investment.

Eighth. This complainant respectfully shows that there is in reference to its property as in reference to all other classes of property in the State of West Virginia, whether owned by individuals or corporations, a difference between the commercial and the tax assessment value, the said commercial value being in respect to all classes of property greater than the value assessed for purposes of taxation; and this complainant does not admit that the tax value as-

sessment is the value which ought to be considered for the
19 purpose of estimating its right to make reasonable earnings on the property used by it;

But this complainant is advised that the State of West Virginia having made the assessment for the purpose of taxation upon this complainant's property in said State cannot deny that its property is worth at least the amount of said assessment:

The total valuation of the property of The Chesapeake and Ohio Railway Company, including its main line and branches hereinbefore named, in the State of West Virginia, made by the Honorable Board of Public Works of the said State (the fiscal authority of the State in the premises), for the said year was Thirty-one Million Dollars ($31,000,000.00).

Taking 9.35 per cent (the ratio which the intra-state passenger earnings in West Virginia bear to the total gross earnings in said State of West Virginia, inter and intra-state) thereof, the value of the property used in the State of West Virginia for intra-state passenger purposes on the basis of the West Virginia assessment for taxation is Two Million Eight Hundred and Ninety-eight Thousand Five Hundred Dollars ($2,898,500.00).

Upon this valuation the net amount earned by this complainant, to-wit, One Hundred and Thirteen Thousand Eight Hundred and Sixty-five *Thousand* Dollars and four cents ($113,865.04), as aforesaid, amounted to 3.8 per cent only, and after deducting the proportion of taxes and expenditures necessary to keep the property up to standard, the net amount earned was only Thirty-one Thousand One Hundred and Fifty-five Dollars and ninety-four cents ($31,155.94), which sum is only 1.07 per cent upon the value of said property so used; but property generally in West Virginia earns, and is entitled to earn, not less than the sum of six per cent per annum.

This respondent therefore respectfully submits that the result of the application of the said statute of the State of West Virginia hereinbefore referred to, and the imposition of the said maxi-
20 mum rate of two cents per mile for the transportation of passengers has been confiscatory; has reduced its earnings below what reasonable passenger fares, rates and charges would produce; has deprived this complainant of its property without just compensation and without due process of law, and has denied to it the equal protection of the laws, all contrary to the Constitution of the State of West Virginia and of the Constitution of the United States, hereinbefore referred to, the benefit and protection of which this complainant respectfully asks.

Ninth. This complainant further shows that its passenger rates, fares and charges in effect at the time of the passage of the statute of West Virginia hereinbefore set forth were not higher than a reasonable compensation for the service rendered by it to travelers on its line, and was in no sense excessive or extortionate. This complainant is advised that as an incident to its property and as a property right, it has the right to charge for carrying passengers, and for each service which it renders, a reasonable compensation, and that it is protected by the Constitution and laws of the State of West Virginia, as well as the Constitution and laws of the United

States hereinbefore referred to, in making, receiving and collecting such reasonable charge; that the effect of the said act of the State of West Virginia, limiting it to two cents per mile for the transportation of passengers, has been and will be to reduce its charges below what is a reasonable charge for the service rendered, and is confiscatory and violative of the Constitution of the State of West Virginia and the Constitution of the United States, as above set forth.

Tenth. Your complainant further respectfully shows that on every railroad the average rate per passenger per mile is less than
21 the maximum, caused by the demand on the part of the travelling public for mileage, commutation and excursion rates, and that the average rate per passenger per mile received by it for the fiscal year ending June 30, 1908, was only 1.78 cents, the lowest passenger rate, it is believed, received by any railroad of equal magnitude, under the same conditions, in the United States, and therefore in the world. The average rate in the United States in 1907 (which is the latest date to which information is available) was 2.04 cents, which rate was arrived at only by the inclusion of the thickly populated New England, Middle Atlantic, and what are usually called the Central Northern States. Eliminating these states, the average rate was 2.33 cents, while the average rate in the South Atlantic States, where conditions of operation are different, and in which group the Chesapeake and Ohio Railway is included, was 2.42 cents.

This rate of 1.78 cents in comparison with that for the year ending June 30, 1907, of the Chesapeake and Ohio Railway shows a reduction of .371 of a cent or three-eighths of a cent, or, to express it more significantly, 17.2 per cent.

As before stated, the average rate of the entire United States for the year 1907 was 2.04 cents, and eliminating the most thickly populated states, where railroad mileage is also greatest, was 2.33 cents. Your complainant therefore received in the year ending June 30, 1908, .254 cents, or one quarter of a cent per passenger mile (equivalent to twelve per cent) less than the average rate of the entire United States, and .544 cents, or more than one-half of a cent (or, more significantly, twenty-five per cent) less than the roads in similar territory.

Not only is the passenger rate on your complainant's railway the lowest comparative rate in the United States for roads of equal magnitude and under similar conditions, but, as it believes and avers, its average freight rate is also the lowest.

22 For the year ending June 30, 1908, its average rate on coal was 3.26 mills; the average on all other freight was 6.95 mills; the average on freight, all classes, was 4.32 mills, against the general average freight rate of the entire United States of 7.82 mills.

The average of the Chesapeake and Ohio Railway on its high class freight, to-wit, 6.96 mills, is less than the average of the general rate in the United States on freight on all kinds, viz., 7.82 mills.

This complainant further avers that, taking the gross earnings of your complainant from all sources intra-state of West Virginia

for the year ending June 30, 1908, the effect of said statute of the State of West Virginia, hereinbefore set forth, and the imposition of the said maximum rate of two cents per mile for the transportation of passengers, has been and is confiscatory.

Eleventh. This complainant further shows that its said rates existing at the time the said statute above referred to went into effect were properly adjusted in their relation between its inter-state rates and its state rates in West Virginia and other states and that all its charges were just and reasonable in themselves and did not give to this complainant more than a just and reasonable return upon the value of its property used in the transportation service which it renders to the public.

This complainant is further advised that no state has a right to require that its own traffic between points within the state shall be given a preferential service or shall be carried at preferential and lower rates than other traffic. No state has a right to require such discrimination or partiality in favor of its own traffic. This
23 complainant respectfully shows that the effect of said rates, established pursuant to the statute of West Virginia, hereinbefore set forth, has been to destroy the proper adjustment of its intra-state rates in West Virginia to its interstate rates generally, and to require that a preference shall be given by this complainant, and an undue discrimination exercised by it, in favor of the intra-state traffic in West Virginia over the interstate passenger traffic carried by this complainant, and over the intra-state passenger traffic of this complainant in other states, especially in the states of Virginia and Kentucky, through which its line extends; and that to require such preferential and such undue discrimination in regard to the intra-state passenger traffic of the State of West Virginia has been to so regulate and burden interstate passenger traffic as to violate the commerce clause of the Constitution of the United States, hereinbefore referred to, the benefit and protection of which this complainant respectfully sets up and claims.

Your complainant further represents to this Honorable Court, as illustrative of the foregoing, that although it is apparent from the foregoing statistics that the revenues of this complainant from its intra-state West Virginia passenger business has been greatly depleted as the result of the enforcement of the maximum passenger rate of two cents per mile, yet the entire effect of said rate upon its interstate revenues in West Virginia does not appear upon the face of said statistics hereinbefore referred to and set forth.

Your complainant avers and charges that since the maximum two cent rate has been put into effect in West Virginia this complainant has not had in effect a similar rate on its interstate business, the direct consequence of which has been that this complainant has been deprived of a large portion of its interstate
24 revenue owing to the fact that such interstate passengers, for the purpose of avoiding the higher interstate rate, have been accustomed, when entering upon an interstate journey, to purchase tickets to the station closest to the state line at the two cent rate, and then purchase another ticket to cover a portion of the remainder

of the interstate journey. To illustrate: The regular interstate rate of this complainant as published and filed with the Interstate Commerce Commission, under provisions of the Interstate Commerce Act, as amended, from Huntington, W. Va., to Washington, D. C., is $10.90; under the practical operation of the said statute of the State of West Virginia imposing a maximum rate of two cents per mile, interstate passenger has been habitually accustomed to purchasing tickets entitling him to be carried from Huntington to Tuckahoe, in West Virginia, under the provisions of said statute, a distance of 196 miles, for the sum of $3.90. Such interstate passenger would, upon arriving at Tuckahoe, either purchase a ticket, which under the rates published and filed, as aforesaid, with the Interstate Commerce Commission, from Tuckahoe to Washington, would be $6.00, or pay the cash fare to the conductor amounting to the sum of $6.00, and thus the interstate trip from Huntington to Washington would cost him the sum of $9.90 instead of the sum of $10.90, which latter is the only lawful rate, thereby causing a loss to this complainant of $1.00 on such movement, and this complainant has been and is powerless to prevent the infraction of the United States law in the premises by transporting said interestate passenger at a less or different compensation between the points named in such passenger tariffs published and filed as aforesaid with the Interstate Commerce Commission than the rates, fares and charges specified in said tariffs filed and in effect at the time of said transportation; unless this complainant should reduce its interstate rates to two cents per mile. This complainant, therefore, respectfully submits that any state law which thus forces an interstate carrier to regulate its interstate rates by the intra-state rates prescribed by such law clearly and directly regulates interstate commerce, and is violative of the interstate commerce clause of the Constitution of the United States in that regard.

The instances above cited are merely illustrative of hundreds of thousands of similar transactions; almost every single interstate passenger movement from and to the State of West Virginia over the lines of this complainant is governed by the same principle, and there are tens of thousands of instances involved, involving the further loss to this complainant of not less than the sum of $50,000.00 per annum.

It is respectfully submitted that the law is a sensible thing—it looks to substance, and not to form; that if this complainant were to resort to such a cut-rate practice, the response of the governmental authorities would be prompt and severe. This complainant respectfully submits that if through the application of the statute of West Virginia above referred to, the passenger is enabled to resort to such a cut-rate practice, this Honorable Court should protect it in its rights in the premises. In essence the cut-rate practice of the passenger being a mere subterfuge for evading the interstate law of the nation, and this complainant, carrier in question, being powerless to prevent it.

As illustrative of the effect of this practice upon the revenues of this complainant, this complainant avers that the number of pas-

sengers to and from Tuckahoe, the nearest station in West Virginia to the Virginia state line, for the four months July to October, inclusive, for the years 1906 and 1908, were as follows:

| | 1906. | 1908. |
|---|---|---|
| To Tuckahoe | 203 | 2260 |
| From Tuckahoe | 355 | 2136 |

26 As further illustrating the effect of this practice, complainant avers that the number of passengers handled from White Sulphur Station, a point near the Virginia state line, increased from 8,754 in the year ending 30th of June, 1906, to 17,729 in the year ending 30th of June, 1908, and from the station of Kenova, the last station in West Virginia and nearest the Kentucky state line, the number increased from 5,824 for said year 1906 to 10,992 for said year 1908, thus showing the abnormal increase which this respondent charges is due to the passage and enforcement of the said Act of the said State of West Virginia, hereinbefore referred to. And this complainant states that this increase does not represent the number of bona fide passengers, but simply shows the extent to which the interstate traveling public take advantage of the situation caused by said statute of the State of West Virginia above referred to.

Twelfth. This complainant says that by section 2 of the said chapter 41 of the Acts of the Legislature of West Virginia of 1907, hereinbefore quoted, it is provided that any railroad company which shall charge, demand or receive any greater compensation for the transportation of any passenger than is authorized by said Act, shall be fined for each offense not less than fifty dollars nor more than five hundred dollars. This complainant is advised that the effect of said Act would be to subject this complainant to a maximum fine of five hundred dollars for each sale of an intra-state passenger tick t at a rate exceeding two cents per mile, or for each act of any conductor on its trains in collecting from any passenger more than two cents per mile.

Your complainant avers that in the operation of its line of railway in West Virginia it receives and carries every day between points in the said State of West Virginia many hundreds of
27 passengers; that an effort is made by these enormous penalties to prevent complainant from having any judicial inquiry made into the validity of said statute, and to so burden any challenge thereof in the Courts of this State that the complainant and others affected thereby must necessarily submit rather than take the chances of the penalties imposed. Your complainant is advised that the effect of these penalties and of said legislation which imposes them, because no other person or business in the State of West Virginia is subjected to such penalties under similar circumstances, is to deprive the complainant of the equal protection of the law and is moreover a denial to the complainant of due process of law, and contrary to the provisions of the Constitution of West Virginia and to the Fourteenth Amendment to the Constitution of the United States, hereinbefore referred to.

Thirteenth. Your complainant further shows to this Honorable Court that in addition to the miles of track owned and operated, set forth in Article First of this bill, it operates, in connection with its main line and branches, through stock ownership the Coal River Railway, which extends from a junction with the main line of the Chesapeake and Ohio Railway at St. Albans station, in Kanawha County, up Big Coal River and its tributaries, in the counties of Kanawha, Boone and Lincoln, aggregating a total mileage of fifty-one and three-tenths (51.3) miles; said road is under process of construction and is strictly a branch feeder constructed at great cost through a mountainous country. There are outstanding upon said Coal River Railway bonds to an amount aggregating as of 30th of June, 1908, $2,100,000.00, on which the interest charge amounts to $75,917.22 for said year.

| | | |
|---|---|---|
| 28 The gross earnings of said Coal River Railway for said year were | | $93,296.23 |
| Operating expenses | | 77,255.90 |
| Leaving a net of | | 16,040.33 |
| Deducting taxes paid thereon to the State of West Virginia for said year | | 8,956.96 |
| Leaves a balance of | | 7,083.37 |
| The Coal River Railway had other income from rents | | 351.90 |
| Making total income, after deducting operating expenses and taxes, of | | $7,435.27 |
| It paid for hire of equipment | $3,499.48 | |
| It provided for interest on its bonds | 75,917.22 | |
| And other interest charges amounting to | 2,660.77 | |
| Making an aggregate of fixed charges | | 82,077.47 |
| Leaving a deficit to be provided for by this complainant of | | 74,642.20 |

Your complainant avers that the allegations of this bill are equally applicable to the Coal River Railway, and that the result of the application of the said statute of West Virginia establishing a maximum passenger rate of two cents per mile is one of the chief reasons why the said line cannot be successfully operated so as to produce revenue in sufficient sum to meet its operating expenses and fixed charges.

Fourteenth. Your complainant further shows that unless this Honorable Court takes jurisdiction of and determines the question of the constitutionality and validity of said statute and affords complainant relief in respect thereto in this cause, the number of actions or penalties to which it will be thus exposed and which will thus be instituted against it will be very enormous, and it will be very difficult, if not practically impossible, to set up the matters of
29 defense which show the invalidity and unconstitutionality of said statute, and in any event it will be seriously and un-

justly burdensome and expensive to the plaintiff to be subjected to the great multiplicity of indictments and prosecutions for penalties to which it would be subjected if relief herein is not granted; that the pendency of said prosecutions involving in the aggregate such enormous amounts of penalties would depreciate the value or the property of this complainant and the value of its stocks and bonds and would greatly impair its credit, and consequently its ability to perform the public service required by the commerce on its lines and would inflict great and irremediable injury and damage not only upon the complainant but upon the holders of its stocks and bonds, as well as upon the shipping and traveling public, and this complainant avers that in all the multitude of indictments and prosecutions which would be instituted for the enforcement of said law the same question would be involved, and that that question is involved and can be tried and the merits fairly determined in this cause; that such indictments and prosecutions would not only be brought in the County of Kanawha, but in each of the counties through which its railroad runs, to-wit,, the counties of Greenbrier, Pocahontas, Monroe, Summers, Fayette, Raleigh, Nicholas, Kanawha, Putnam, Cabell, Lincoln, Logan, Wayne and Boone, so that it would be obliged to make defense to these indictments and prosecutions in a great many different places and counties at the same time. Therefore this complainant respectfully submits that because of said multiplicity of suits and because of said irremediable injury, this Court has full jurisdiction in the premises.

Fifteenth. This complainant further says that having in good faith put into effect the statute of West Virginia hereinbefore set forth, and having ascertained from the practical operation thereof that the said statute has had the effect hereinbefore set forth, it has announced that it would disregard the law as void and of no effect; and thereupon the defendant, —— ——, Prosecuting Attorney of Kanawha County, has given notice to this complainant that if it violated said law by selling tickets or charging passengers more than two cents per mile, he would present the matter to the grand juries of said county and procure indictments against the complainant and prosecute it for each offense. And the said defendant, —— ——, Attorney General of the State of West Virginia, has also given notice that he will take such action as lies within the power of his office to enforce said law criminally against the complainant, its officers and employees.

This complainant now respectfully shows to this Honorable Court that its purpose in this cause is by an orderly proceeding in the courts to obtain a judicial determination of its rights under the Constitution of West Virginia and under the Constitution and laws of the United States, and if as it is advised and believes its just rights in the premises are imperiled, denied and encroached upon by the statute hereinbefore set forth, to obtain a judicial decree establishing and protecting the rights of this complainant in the premises.

This complainant further says that whenever its said earnings shall increase to such an extent as to enable it to pay a reasonable return upon the value of its property devoted to the use in question,

it will then, after that, as its earning increase beyond that point, be entirely equitable, just and reasonaboe for a reduction to be made, and it will be entirely willing that the same shall be done, and it is willing to make reports either to this Court or to any depart-
31 ment of the government of the State of West Virginia, showing its revenues from time to time, so that the said statute hereinbefore referred to may be made applicable to this complainant whenever it may be just, reasonable and equitable so to do.

*Prayer.*

In consideration whereof, and forasmuch as this complaint is remediless in the premises at law under the rules of the common law and can have relief only in a court of equity where matters of this nature are properly cognizable and relievable, and to the end that the defendants herein named may answer the several matters and things hereinbefore set forth as fully and as particularly as if the same were again herein repeated and they were thereunto especially interrogated, this complainant prays that the said W. G. Conley, Attorney General of the State of West Virginia, S. B. Avis, Prosecuting Attorney of Kanawha County, C. L. Estep of Boone County, Jean F. Smith of Cabell County, George Love of Fayette County, J. S. McWhorter of Greenbrier, R. G. Steed of Lincoln, E. H. Green of Logan, R. L. Keadle of Monroe, S. R. King of Nicholas, F. R. Hill of Pocahontas, C. C. Knapp of Putnam, Hugh A. Dunn of Raleigh, T. N. Read of Summers and D. B. Hardwick of Wayne County; as such attorneys and officials, be made parties defendant and required to answer, but answer under oath is hereby expressly waived; that a writ of injunction may be issued out of this court enjoining, restraining and prohibiting the said defendants, and all other individuals and persons whomsoever, from instituting or bringing, or causing to be instituted or brought, any action, suit, prosecution or other proceeding against your complainant or any of its officers, agents or employes, to recover any fine, penalty or damages occurring under or imposed by the said Act of February
32 20, 1907, hereinbefore referred to, limiting the charges for the transportation of passengers, with ordinary baggage not exceeding one hundred pounds in weight, to the maximum sum of two cents per mile or fractional part of a mile; and from instituting or causing to be instituted, any proceeding for mandamus, injunction, mandatory injunction, prohibition or other proceeding against your complainant, or against any officer, agent or employe of your complainant, to compel your complainant to put into effect or observe said statute; also restraining and enjoining all other individuals, persons or corporations now, or hereafter, claiming any right under or by virtue of said statute from instituting, bringing or prosecuting any suit or suits against your complainant for the recovery of damages or for any other cause of action for your complainant's failure to observe the requirement of the said statute; that the said statute may be declared to be null and void and of no effect so far as it relates to complainant's lines of railroad in the State of

West Virginia hereinbefore set forth; that the said defendants as aforesaid, and each of them, may be enjoined, restrained and prohibited from procuring or attempting to procure indictments against this complainant and from instituting criminal proceedings or prosecutions against it of any character, because of its failure to observe and carry out the said two-cent law or because of any violation of said law by this complainant, and that this complainant may have such further and general relief in the premises as the nature of its case requires and the court may see fit to grant.

THE CHESAPEAKE & OHIO RAILWAY COMPANY,
By SIMMS, ENSLOW, FITZPATRICK & BAKER, *Solicitors.*

F. B. ENSLOW,
H. T. WICKHAM,
*Counsel.*

33 STATE OF VIRGINIA,
*City of Richmond, To wit:*

George W. Stevens being duly sworn says that he is the President of the Chesapeake and Ohio Railway Company, the complainant in the Bill of Complaint attached hereto against the Attorney General of the State of West Virginia and others; that the facts therein set out are peculiarly within his knowledge as President of the plaintiff Company; that all the facts stated in said bill and allegations therein contained are true as he verily believes.

GEO. W. STEVENS.

Taken, subscribed and sworn to before me, the undersigned Notary Public, in and for the City of Richmond, State of Virginia, this 25th day of May, 1909. Witness my official signature and seal.

[SEAL.] A. TREVVETT,
*Notary Public.*

(No stamp required)
My Commission expires March 11th, 1913.

(And at another day, towit, at a Circuit Court for Kanawha County, held at the Court House thereof, on the 22d day of June, 1909.)

In Chancery. No. 2139.

CHESAPEAKE & OHIO RAILWAY CO., a Corporation,
vs.
W. G. CONLEY, S. B. AVIS et als.

This day this cause came on to be heard upon the plaintiff's bill, and thereupon, Wm. G. Conley, S. B. Avis, et al., defendants to said bill of complaint, made a special appearance and tendered their special written motion to dismiss the said bill for reasons set out in said motions, which is filed, which motion the Court overruled,

and thereupon without waiving said motion the said defend-
34 ants tendered their demurrer in writing which is hereby filed and the said demurrer being argued by counsel is overruled; upon consideration whereof the Court is of opinion and doth find that the Act of the Legislature of West Virginia, passed on the 20th day of February, 1907, being Chapter 41 of the Acts of 1907, entitled, "An act relating to and regulating passenger rates upon railroads in the State of West Virginia and prosecuting penalties for the violation thereof," is unconstitutional and void, and that the plaintiff is entitled to an injunction against W. G. Conley, Attorney General of the State of West Virginia; S. B. Avis, Prosecuting Attorney of Kanawha County; C. L. Estep, Prosecuting Attorney of Boone County; Jean F. Smith, Prosecuting Attorney of Cabell County; George Love, Prosecuting Attorney of Fayette County; J. S. McWhorter, Prosecuting Attorney of Greenbrier County; R. G. Steed, Prosecuting Attorney of Lincoln County; E. H. Green, Prosecuting Attorney of Logan County; R. L. Keadle, Prosecuting Attorney of Monroe County; S. R. King, Prosecuting Attorney of Nicholas County; F. R. Hill, Prosecuting Attorney of Pocahontas County; C. C. Knapp, Prosecuting Attorney of Putnam County; Hugh A. Dunn, Prosecuting Attorney of Raleigh County; T. N. Read, Prosecuting Attorney of Summers County; D. B. Hardwick, Prosecuting Attorney of Wayne County, as such attorneys and officials, enjoining them and each of them, from enforcing the said Act, as prayed for in the plaintiff's bill of complaint. It is, therefore, adjudged, ordered and decreed that the defendants, Wm. G. Conley, Attorney General of the State of West Virginia; S. B. Avis, Prosecuting Attorney of Kanawha County; C. L. Estep, Prosecuting Attorney of Bone County; Jean F. Smith, Prosecuting Attorney of Cabell County; Geo. Love, Prosecuting Attorney of Fayette County; J. S. McWhorter, Prosecuting Attorney of Greenbrier County; R. G. Steed, Prosecuting Attorney of Lincoln County; E. H. Green,
Prosecuting Attorney of Logan County; R. L. Keadle, Pros-
35 ecuting Attorney of Monroe County; S. R. King, Prosecuting Attorney of Nicholas County; F. R. Hill, Prosecuting Attorney of Pocahontas County; C. C. Knapp, Prosecuting Attorney of Putnam County; Hugh A. Dunn, Prosecuting Attorney of Raleigh County; T. N. Read, Prosecuting Attorney of Summers County; D. B. Hardwick, Prosecuting Attorney of Wayne County; and all other persons and individuals whomsoever are enjoined, restrained and prohibited from instituting or bringing, or cause to be instituted or brought, any action, suit, prosecution or other proceeding against the complainant, or any of its officers, agents or employees, to recover any fine, penalty or damages occurring under or imposed by the said Act of February 20th, 1907, hereinbefore referred to, limiting the charge for the transportation of passengers, with ordinary baggage not exceeding one hundred pounds in weight, to the maximum sum of two cents per mile or fractional part of a mile; and from instituting or causing to be instituted, any proceeding for mandamus, injunction, mandatory injunction, prohibition or other proceeding against the complainant, or against any officer, agent or

employee of the complainant, to compel the complainant to put into effect or observe said statute, and all other persons, individuals or corporations now, or hereafter, claiming any right under or by virtue of said statute, are restrained and enjoined from instituting, bringing or prosecuting any suit or suits against the complainant for the recovery of damages or for any other cause of action on account of the complainant's failure to observe the requirement of the said statute, and the said Attorney General and the Prosecuting Attorneys, and any and all persons, are also enjoined, restrained and prohibited from procuring or attempting to procure indictments against the complainant, and from instituting criminal procedings or prosecutions against it of any character, because of its failure to observe and carry out the said two cent law or because of any violation of the said law by complainant.

But it is further ordered that in event the complainant shall put into effect upon its lines any rate or rates for intra-
36 state passenger travel within the State of West Virginia exceeding the rate named in said Act of February 20th, 1907, entitled an act relating to and regulating passenger rates upon railroads in the State of West Virginia and prosecuting penalties for the violation thereof, the said complainant shall give to any person who travels between points on its line in the State of West Virginia at a rate exceeding two cents per mile coupons substantially in the following form, towit:

"The Chesapeake and Ohio Railway Company,
West Virginia Ticket Claim Coupon
When stamped by issuing agent
To be retained by passenger
Not good for passage.

Issued under the order of the Circuit Court of the County of Kanawha in a suit in equity therein pending between the Chesapeake and Ohio Railway Company and W. G. Conley, Attorney General, and others;"

and that said coupon shall be of such form and number as that from it, in connection with the ticket or other evidence of transportation to which it corresponds, may be ascertained the sum to which such persons shall be entitled in the event this order of this Court be set aside, vacated or reversed.

And it is further ordered that the complainant herein shall, until further order of this Court, preserve and produce whenever so ordered by this Court all cancelled tickets or other evidence of transportation in respect to which coupons as hereinabove provided for may be outstanding and shall from time to time as may be required by order of this Court so to do, report to the Court statements showing the revenue by it charged and collected for the intrastate transportation of passengers in the State of West Virginia in excess of the amount permitted by said Act of February 20th, 1907, as above referred to.

(Motion to dismiss, referred to in the foregoing order, is in the words and figures following, towit:)

In Chancery.

CHESAPEAKE & OHIO RAILWAY CO., a Corporation,
vs.
W. G. CONLEY et al.

37 This day appeared the defendants, W. G. Conley, S. B. Avis, C. L. Estep, Jean F. Smith, George Love, J. S. McWhorter, R. G. Steed, E. H. Green, R. L. Keadle, S. R. King, F. R. Hill, C. C. Knapp, Hugh A. Dunn, T. N. Read and D. B. Hardwick, Specially and only for the purpose of moving, and do hereby move, that the bill in this cause be dismissed upon the ground that this suit is one against the State of West Virginia and prohibited by the Constitution of West Virginia; and for the further reason that the defendants neither of them have any personal interest in this cause.

(The Joint and Separate Demurrer, referred to in the foregoing order, is in the words and figures following, towit:)

In the Circuit Court of Kanawha County, West Virginia.

In Chancery.

THE CHESAPEAKE & OHIO RAILWAY COMPANY
vs.
WILLIAM G. CONLEY, Attorney General, et al.

The Joint and Separate Demurrer of William G. Conley, Attorney General of the State of West Virginia; S. B. Avis, Prosecuting Attorney of Kanawha County; C. L. Estep, Prosecuting Attorney of Boone County; Jean F. Smith, Prosecuting Attorney of Cabell County; George Love, Prosecuting Attorney of Fayette County; J. S. McWhorter, Prosecuting Attorney of Greenbrier County; R. D. Steed, Prosecuting Attorney of Lincoln County; E. H. Green, Prosecuting Attorney of Logan County; R. L. Keadle, Prosecuting Attorney of Monroe County; S. R. King, Prosecuting Attorney of Nicholas County; F. R. Hill, Prosecuting Attorney of Pocahontas County; C. C. Knapp, Prosecuting Attorney of Putnam County; Hugh A. Dunn, Prosecuting Attorney of Raleigh County; T. N. Read, Prosecuting Attorney of Summers County; D. B. Hardwick, Prosecuting Attorney of Wayne County; defendants to the bill of complaint of the Chesapeake & Ohio Railway
38 Company, plaintiff.

These defendants, by protestation, not confessing all or any of the matters or things in the bill of complaint in the above

styled cause contained to be true, in such manner and form as the same are therein set forth and alleged, do jointly and separately demur to the said bill and to each paragraph and part thereof, and, for causes of demurrer, show:

1. That the plaintiff's bill filed herein does not state any matter of equity entitling complainant to the relief prayed for, nor are the facts stated in said bill, sufficient to entitle the complainant to any relief against these defendants, jointly or severally.

2. That it appears from said bill that this cause is in truth and effect a suit against the State of West Virginia without its consent, and therefore in violation of Section 35 of Article VI of the Constitution of West Virginia.

3. That it appears from said bill that your Honorable Court has no jurisdiction of said bill, or the subject matter therein contained.

4. That it appears from said bill that the Act of the Legislature of West Virginia in question, viz, Chapter 41 of the Acts of 1907, is constitutional.

5. That it appears from said bill that this suit is in truth and in effect a suit to enjoin the institution of criminal proceedings and to enjoin criminal prosecutions.

6. That it also appears from the bill that the plaintiff has a plain, complete and adequate remedy at law.

7. That the Act of the Legislature complained of is not in violation of any constitutional provision of the State of West Virginia or of the United States, nor is it in violation of any interstate commerce law enacted by the Congress of the United States, and now in force.

39 8. That said bill does not have the seal of the plaintiff corporation attached thereto.

9. That it appears from said bill, that the same is filed and exhibited against the defendant, William G. Conley, in his official capacity as the Attorney General of the State of West Virginia, and that the same is filed and exhibited against the defendants, S. B. Avis, C. L. Estep, Jean F. Smith, George Love, J. S. McWhorter, R. D. Stead, E. H. Green, R. L. Keadle, S. R. King, F. R. Hill, C. C. Knapp, Hugh A. Dunn, T. N. Read and D. B. Hardwick, each in his official capacity as the Prosecuting Attorney of his County respectively, and that the relief sought against these defendants, and each of them, is the judicial control and restraint of the executive and discretionary action of these defendants, and each of them, in their official capacity aforesaid, and that it appears from said bill the defendants named therein, and each of them, have no personal interest whatever in this suit.

10. That said bill is otherwise uncertain, inadequate and insufficient at law.

Wherefore, and for divers other good causes of demurrer appearing upon the face of said bill, and in each paragraph and part thereof, these defendants, jointly and separately, demur thereto, and they pray the judgment of this Honorable Court, whether they, or either of them, shall be compelled to make any further or other answer

to the said bill, and they humbly pray to be hence dismissed with their reasonable costs in this behalf sustained.

WM. G. CONLEY,
*Attorney General, West Virginia.*
S. B. AVIS,
*Prosecuting Attorney, Kanawha County.*
C. L. ESTEP,
*Prosecuting Attorney, Boone County.*
JEAN F. SMITH,
*Prosecuting Attorney, Cabell County*
40 GEORGE LOVE,
*Prosecuting Attorney, Fayette County.*
J. S. McWHORTER,
*Prosecuting Attorney, Greenbrier County.*
R. D. STEED,
*Prosecuting Attorney, Lincoln County.*
E. H. GREEN,
*Prosecuting Attorney, Logan County.*
R. L. KEADLE,
*Prosecuting Attorney, Monroe County.*
S. R. KING,
*Prosecuting Attorney, Nicholas County.*
F. R. HILL,
*Prosecuting Attorney, Pocahontas County.*
C. C. KNAPP,
*Prosecuting Attorney, Putnam County.*
HUGH A. DUNN,
*Prosecuting Attorney, Raleigh County.*
T. N. READ,
*Prosecuting Attorney, Summers County.*
D. B. HARDWICK,
*Prosecuting Attorney, Wayne County.*

(And at another day to-wit: At a Circuit Court for Kanawha County, held at the Court House thereof, on the 28th day of June, 1910.)

In Equity. No. 2139.

THE CHESAPEAKE & OHIO RAILWAY COMPANY,
vs.
WILLIAM G. CONLEY, Attorney General, et al.

This cause came on this day again to be heard upon the Bill and Exhibits filed herein and the process duly served upon all the defendants, upon the appearances, motions and papers heretofore filed and read herein and upon the former orders made and proceedings had herein; and thereupon the defendants tendered their joint and separate answer to the plaintiff's bill, to the filing of which the plaintiff objected, which objections being considered, are overruled and the said answer filed; thereupon the plaintiff, over the objections of the

defendants, filed its exceptions in writing to the said answer
41 and moved that the said answer be stricken from the files and the Court having duly considered said motion and the exceptions, overruled the said motion and the exceptions to said answer.

Thereupon the plaintiff filed its demurrer to the defendant's answer, and the same is set down for argument, and being argued by counsel, the Court is of the opinion that the law is for the defendants and doth overrule said demurrer.

Thereupon the plaintiff filed its general replication to the defendant's answer, and it being admitted by counsel for the defendants that there are railroads in the State of West Virginia under fifty miles in length and not a part of or under the control, management or operation of any other railroad over fifty miles in length, operating wholly or in part in said State; and it is further admitted that there are electric lines and street railways owned and operated in this State, not operated, controlled or managed by the plaintiffs herein, and the said railroads and lines embraced in said admissions are in a class to which the said statute and the provisions thereof as to the two cent charge or transportation of passengers are not applicable and the plaintiff not desiring to take any testimony in said cause, but both sides desiring to submit the cause for a determination, and the cause now coming on to be heard upon the constitutional questions raised by the Bill, Special Appearance, Motions to Dismiss, Answer, Exceptions, Demurrer and Replication, other motions and papers in the cause, and upon said admissions of fact as to classes of railroads to which the act was not applicable, and the defendants renewing their motion to dissolve the preliminary injunction heretofore granted herein on the 22nd day of June, 1909, the Court after consideration of all of which, and the Supreme Court of Appeals of this State, having decided that Chapter 41 of the Acts of the Legislature of West Virginia of 1907, is Constitutional and valid, is of the opinion that the motion of the defendants to dissolve the injunction and to dismiss the Bill should prevail;

42 It is therefore adjudged, ordered and decreed, That the injunction heretofore awarded herein on the 22nd day of June, 1909, be, and the same is hereby dissolved, vacated and annulled and the Bill dismissed with costs to the defendants; and the defendants moving the Court to provide a manner in which the coupons issued by the plaintiff under the order of this Court, entered on the 22nd day of June, 1909, can be redeemed, it is further ordered that the plaintiffs do receive, redeem and pay to the respective parties holding the same, through its proper agents at Charleston, Huntington and Hinton, the coupons issued by it under said order of this Court entered on June 22nd, 1909.

The plaintiff desiring to appeal from this decree to test the constitutionality of the said two cent passenger act complained of, Chapter 41, Acts of the Legislature of West Virginia of 1907, as to the state and federal constitution, is hereby given a stay of sixty (60) days to perfect said appeal to the Supreme Court of the State of West Virginia, and until said appeal is granted or said sixty days expire, the

injunction heretofore awarded on the 22nd day of June, 1909, is continued in force.

(The Joint and Separate Answer referred to in the foregoing order is in words and figures following, to-wit:)

## In Equity.

THE CHESAPEAKE & OHIO RAILWAY COMPANY,
v.
WM. G. CONLEY, Attorney General, et al.

The joint and separate answer of Wm. G. Conley, Attorney General of the State of West Virginia; S. B. Avis, Prosecuting Attorney of Kanawha County; C. L. Estep, Prosecuting Attorney of Boone County; Jean F. Smith, Prosecuting Attorney of Cabell County; George Love, Prosecuting Attorney of Fayette County; J. S. McWhorter, Prosecuting Attorney of Greenbrier County; R. D. Steed, Prosecuting Attorney of Lincoln County; E. H. Green, Prosecuting Attorney of Logan County; R. L. Keadle, Prosecuting Attorney of Monroe County; S. R. King, Prosecuting Attorney of Nicholas
43 County; F. R. Hill, Prosecuting Attorney of Pocahontas County; C. C. Knapp, Prosecuting Attorney of Putnam County; Hugh A. Dunn, Prosecuting Attorney of Raleigh County; T. N. Read, Prosecuting Attorney of Summers County; and D. B. Hardwick, Prosecuting Attorney of Wayne County; all in said State of West Virginia, to the bill of Complaint of the Chesapeake & Ohio Railway Company, a corporation, filed against them in the Circuit Court of Kanawha County, said State.

To the Honorable Samuel C. Burdett, Judge of said Circuit Court:

These respondents, reserving to themselves all right of exceptions to the said bill of complaint, for answer thereto, or so much thereof as they are advised it is material for them to answer, jointly and severally answer and say:

First. That these respondents admit the truthfulness of the allegations of the plaintiff's bill, as set out in the first paragraph thereof, as to the number of miles of railroad leased and operated by it, with the exception that the number of miles of second track allotted to Fayette should be 41.89 instead of 49.19 miles; and the further exception that the number of miles of siding as allotted to several of the counties named therein are incorrectly reported, and that the total number of miles of main track, second track, branches and sidings in West Virginia, as these respondents are informed and believe, are as follows, to-wit: miles of main track 205.39; miles of second track 157.60 instead of 164.90; miles of branches 334.70 instead of 335.30; miles of sidings 240.83 instead of 246.70.

Second. That these respondents do not admit, as alleged in paragraph second of the plaintiff's bill, that the actual cost to the plaintiff of its railway system, exclusive of equipment, was $138,229,136.02; but these respondents are informed, believe and aver, that a

large amount of said sum, and aggregating many millions of
44 dollars, was not expended in the railroad proper, but was expended in the purchase of coal and timber lands, steamboats and barges, hotels and other real estate, and in bonds and stocks of other corporations, and in other securities, and here call for full and complete proof of the actual present value of said railway system proper, and especially that part of it in the State of West Virginia, and of the actual amount invested in other property, and the kind of such property, with the present value thereof; and these respondents further aver, that whatever the actual cost of said railway system may be, that the true and actual present value of the grand total of all of plaintiff's railroad property, including equipment, assignable to West Virginia, as shown by the affidavit of one of its officers for the year ending June 30, 1908, is only $8,938,-112.00, as shown by the annual return of the plaintiff to the Board of Public Works of West Virginia, for the year ending June 30, 1908, to which reference is here made; and that the true and actual value of said property allotted to the State of West Virginia, as of the 30th day of June, 1909, was $9,987,685.00, as is shown by the annual return of said company to the Board of Public Works of West Virginia, for the year ending June 30, 1909, to which reference is here made.

That it is not true, that the entire property of the plaintiff in West Virginia is in a "Mountainous region, with an exceptionally large number of cuts, fills, and tunnels," but that a considerable portion of said property, especially in the western part of West Virginia, runs through practically level territory, and easy of construction, operation and maintenance; but these respondents admit that a considerable portion of said railroad in West Virginia is in a mountainous region with a large number of cuts, fills and tunnels; that these respondents have no way of knowing, except from the allegations of the plaintiff's bill, that its railways were honestly and economi-
45 cally constructed and are honestly and economically operated, and here call for full and complete proof of said allegations; that these respondents deny, on information and belief, that the expenses of construction and operation of the plaintiff's railroad were and are greater in the State of West Virginia, owing to the "geographical formation of the region and to the liability of slides, washouts and physical interruptions to train service," than in great portion of the States of Virginia, Kentucky and Ohio.

That it may be true, as alleged in the second paragraph of plaintiff's bill, that the actual cost to the plaintiff, as of the 30th day of June, 1908, of all of its equipment owned was $14,417,508.45; and it may also be true that it has equipment covered by car-trust agreements in the sum of $14,420,000.00, but these respondents aver, on information and belief, that its passenger equipment is greatly depreciated and far below the standard.

But these respondents are advised, that the plaintiff having placed under oath a "true and actual value" on the grand total of all of its property in the State of West Virginia for the year ending June 30, 19[illegible], at $8,938,112.00, and for the year ending June 30,

1909, at $9,987,685.00, as alleged in paragraph two of this answer, said plaintiff cannot be heard to deny said value in this proceeding.

Third. That it may be true, as alleged in the third paragraph of plaintiff's bill, that it had outstanding upon its system, as of the 30th day of June, 1908, capital stock aggregating $62,799,100.00, and a bonded debt, including equipment-trust certificates, aggregating $114,188,000.00; but these respondents aver, on information and belief, that the actual or market value of the capital stock of said Company was on that day and still is far below par, and that the bonds and equipment-trust certificates were then and still are below par; and these respondents here call for full proof as to the true and actual value of said capital stock, bonds and equip-
46 ment-trust certifi*f*ates.

Fourth. That it is true, as alleged in the fourth paragraph of plaintiff's bill, that the Legislature of the State of West Virginia did, on the 20th day of February, 1907, pass an act in the words and figures set out in said fourth paragraph, commonly known as the "Two Cent Passenger Act," and being chapter 41, Acts of the Legislature of 1907; and it is also true that said act was approved by the Governor of West Virginia, and that said act went into effect on the 21st day of May, 1907, and that the same has never been repealed by the Legislature of said State.

It is also true, that prior to the passage of said act, the complainant had the legal right to charge within the limits of West Virginia about three cents per mile, or fraction of a mile, for the transportation of passengers with ordinary baggage; but these respondents aver that said charge per passenger of three cents per mile or fraction thereof was unreasonable and excessive for the services rendered. That it is also true, as respondents are informed and believe that the plaintiff corporation did comply with the provisions of said Two Cent Passenger Act from the time said Act went into effect on the 21st day of May, 1907, to the time of the institution of these proceedings and the granting of the preliminary injunction herein on the 22nd day of June, 1909; but these respondents deny that its compliance with said law has had any serious or material effect on the income of the plaintiff company.

Fifth. That it is true the application of said maximum rate of two cents per mile per passenger did reduce the rate theretofore charged by said plaintiff; but these respondents deny that the operation of said two cent passenger law decreased its earnings from passenger fares as charged in the fifth paragraph of plaintiff's bill, but aver, on information and belief, that the operation of said Two
47 Cent Passenger Act materially increased the passenger earnings of the complainant company, by the great increase in the number of passengers traveling over its lines within the limits of said State of West Virginia. These respondents further aver that the total receipts from passenger fares alone within the State of West Virginia for the year ending June 30, 1907, and during the operation of the three cent passenger fare, (excepting for the period from May 21, 1907, when said two cent passenger act went into effect until said 30th day of June, 1907), aggregated only $1,545,-

379.95, and that the total receipts from passenger fares alone within the State of West Virginia for the year ending June 30, 1908, and during the operation of said two cent passenger rate, aggregated $1,624,961.23, an increase in one year of $79,581.28 in favor of the two cent passenger act.

These respondents further aver, that the main track of mileage operated in West Virginia for the year ending June 30, 1907, to the total mileage of main track operated by the plaintiff's entire system was 29.36%, and that the passenger fares in West Virginia for the year ending June 30, 1907, *was* 31.61% of its entire operating passenger revenues; that said mileage in West Virginia for the year ending June 30, 1908, was 29.39% of its total main track mileage, and that the passenger fares in West Virginia for the year ending June 30, 1908, during the operation of said two cent passenger law, *was* 31.73% of its entire passenger revenues, an increase over the year 1907 when the three cent passenger act was in force; that the main track mileage in West Virginia for the year ending June 30, 1909, was 31.73% of its total track mileage, and that the passenger fares in West Virginia for the year ending June 30, 1909, also during the operation of said two cent passenger fare, *was* 32.95% of its entire passenger revenue, an increase of 1.34% over the year ending June 30, 1907, when the three cent passenger fare was in force.

48 These respondents deny, that "a direct loss of revenue has been caused to this complainant for the year ending June 30, 1908," because of said act prescribing the maximum rate of two cents per mile; and they deny that because of said act "a further direct loss of revenue has been caused to it for the six months ending the 30th of December, 1908"; and they deny that this complainant "has sustained indirectly a still further loss because of the facility with which passengers can and do largely evade requirements of the Interstate Commerce Act and the through rates by purchasing tickets to the local point and then using the ticket thus purchased as a part of an interstate journey"; but on the contrary respondents aver, that the legal maximum passenger rate in West Virginia of two cents per mile for each passenger, which the complainant may legally charge, is greater than the average charge per passenger per mile over the entire system of said complainant, which average charge per passenger per mile over its entire system for the year ending June 30, 1908, was only 1.786 cents, as is shown on page 16 of the Thirtieth Annual Report of the Board of Directors to the Stockholders of the plaintiff company for the fiscal year ending June 30, 1908, to which reference is here made; and they further aver, that the plaintiff was before and at the time of the taking effect of the act complained of and is now selling mileage books at two cents per mile over its entire system including the State of West Virginia.

Sixth. These respondents deny, that the operation of said two cent passenger act deprived the plaintiff of any rights, privileges and immunities granted to it under the Constitution of the United States and under any provision of the Constitution of the State of

West Virginia, as charged in the sixth paragraph of its bill; and these respondents further deny, on information and belief, that the amount in controversy in this cause, exclusive of interest and costs exceeds the sum of $500,000.00.

49 Seventh. These respondents admit, that it may be true that the gross earnings of the plaintiff from all sources, both inter and intra-state, in the State of West Virginia, for the year ending June 30, 1908, were $8,756,027.97, and it may be true that the operating expenses in the State of West Virginia, for said year were $6,225,863.29, leaving net earnings from all sources in West Virginia of $2,530,164.68, as alleged in the seventh paragraph of the plaintiff's bill, but full proof of said allegations is here demanded, believing, as these respondents do, that the net earnings will largely exceed said sum. These respondents deny, on information and belief, that plaintiff's earnings from its passenger business in West Virginia for the year ending June 30, 1908, were only $819,172.94, as alleged by it in said paragraph; but on the contrary aver, that the total operating passenger revenues of complainant company for the year ending June 30, 1908, received from West Virginia as sworn to by an officer of said company, was $1,879,741.41, and that the receipts from passenger fares alone from West Virginia for the year ending June 30, 1908, as sworn to by the same officer, *was* $1,624,961.23; and these respondents further deny, that the plaintiff's intrastate West Virginia Passenger expenses for said period were not less than $705,307.90, but aver that said passenger expenses for said period on any just and equitable apportionment were much less than said sum, and here call upon the plaintiff to fully prove its allegations; and these respondents still further deny that the maximum net earnings from plaintiff's said intrastate passenger traffic in West Virginia *is* only $113,865.04, but aver that said net earnings are largely in excess of said amount, and here call upon the plaintiff to fully prove its allegations; and these respondents still further deny, that the manner of prorating the total West Virginia property tax to intrastate West Virginia passenger earnings, as set out in paragraph seven of the plaintiff's bill, is a just and equitable prorating thereof, and here aver that the same is arbitrary

50 and without warrant; and these respondents still further deny, that the plaintiff's arbitrary method of prorating its intrastate passenger earnings to total gross earnings in West Virginia, as contained in the seventh paragraph of its bill, is proper, correct, or fair.

That it is not true, as alleged in paragraph seven of said bill, that the $33,537,244.00 of the $114,188,000.00 of the bonded and equipment trust certificate indebtedness is allotted to West Virginia on the basis of miles operated; but on the contrary, these respondents, on information and belief, aver that the amount thereof allotted to West Virginia on said basis for the year ending June 30, 1908, does not exceed the sum of $30,093,570.55, and they deny that the annual interest charge thereon is $1,402,706.09; and they further deny, that the total interest, trackage and rental applicable to West Virginia, as alleged in said paragraph seven, is $1,421,170.55; and

they still further deny, that any proper, legal, or equitable apportionment of the intrastate passenger earnings in West Virginia and the intrastate passenger expenses in West Virginia will create a deficit of $19,014.41, as alleged in said paragraph seven, but aver, on information and belief, that any equitable, just or legal apportionment thereof will show a large net income in favor of the passenger department; and they still further deny, that the deduction of its proportion of taxes and expenses reasonably necessary to keep said property up to its usual standard, will result in a deficit of $101,723.51; and on information and belief they aver, that a large net income is realized by the complainant therefrom.

These respondents still further aver, that a fair and equitable apportionment of the complainant's revenues and expenses as shown by its sworn report filed with the Board of Public Works of the State of West Virginia for the tax-paying year of 1909, showing earnings, expenses and other financial operations as of the year ended June 30, 1908, and the physical property in the State of West Virginia as of the year ended December 31, 1908, would
51 be as follows to-wit:

Mileage operated in all States, 1839.60.
Mileage operated in West Virginia, 540.69.
(Per cent. in West Virginia, total mileage operated, 29.39%.)

| | |
|---|---|
| Gross earnings from operation in West Virginia... | $8,756,027.97 |
| Operating expenses and taxes in West Virginia.... | 6,510,233.31 |
| (Percentage of operating expenses and taxes to gross earnings, 74.35%.) | |
| Leaving net earnings in West Virginia after the payment of taxes ..... | 2,245,794.66 |
| The passenger earnings, which include passenger fares, mail, express, baggage and "other items" in all states ..... | 6,040,372.00 |
| The same in West Virginia..... | 1,879,741.41 |
| (Percentage in West Virginia, 31.12%.) | |
| The passenger fares alone in all states..... | 5,120,528.63 |
| The passenger fares alone in West Virginia..... | 1,624,961.23 |
| (Percentage in West Virginia, 31.73%.) | |

*Operating Expenses in West Virginia, Passenger and Freight, as Reported by the Plaintiff.*

| | |
|---|---|
| Maintenance of way and structures. | $1,093,852.60 |
| Maintenance of equipment ..... | 1,920,294.17 |
| Traffic ..... | 157,665.86 |
| Conducting transportation ..... | 2,916,788.48 |
| General Expenses ..... | 137,262.18 |
| Taxes ..... | 284,370.02 |
| Total..... | $6,510,233.31 |

Of which, there is

*Chargeable to Passenger Service.*

| | | |
|---|---|---|
| Maintenance of way and structures, 12.4% (*a*) of above, or | | $135,637.12 |
| Maintenance of equipment, 8.2% (*b*) of above, or | | 157,464.12 |
| Traffic, 21.5% (*c*) of above, or | | 33,898.16 |
| Conducting transportation 12.4% (*a*) of above, or | | 361,681.77 |
| General expenses, 21.5% (*c*) of above | | 29,511.37 |
| Taxes, 21.5% (*c*) of above, or | | 61,139.55 |
| | | $778,332.69 |
| (*a*) Mileage empty freight cars, entire lines | 90,632,779 | |
| Mileage loaded freight cars, entire lines | 155,298,570 | 155,298,570 |
| Mileage passenger cars, entire line | 21,835,619 | 21,835,619 |
| | | 177,134,189 |

Not counting mileage of empty freight cars above, the passenger car mileage to both passenger and loaded freight, is nearly 12.4%, which operates more favorably to the plaintiff; but these rerespondents reserve the right to include said empty car mileage in future calculations.

52

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|---|---|
| (*b*) Repairs and renewals of freight cars, entire lines | $3,389,774.46 |
| Repairs and renewals of passenger cars, entire lines | 299,059.10 |
| Repairs and renewals, passenger and freight | $3,688,833.56 |

So that repairs and renewals of passenger cars to repairs and renewals of passenger and freight cars is nearly 8.2%.

| | |
|---|---|
| (*c*) Freight earnings in West Virginia | $6,852,765.61 |
| Passenger earnings in West Virginia, as per report | 1,879,741.41 |
| Freight and passenger | $8,732,507.02 |

So that the passenger earnings to both freight and passenger earnings in West Virginia, is 21.5%.

| | | |
|---|---|---|
| Passenger earnings in West Virginia as reported... | | $1,879,741.41 |
| Passenger expenses in West Virginia as estimated.. | | 778,332.69 |
| Net passenger earnings in West Virginia, after payment of taxes..... | | $1,101,408.72 |
| Certain improvements charged to income are noted on form # 12 of the report, and embrace amounts charged to right of way, real estate, fences, grading and bridges and culvert masonry, bridges and trestles, rails, ties, other superstructure, buildings, furniture and fixtures, shop machinery and tools, engineering expenses, telegraph or telephone line, amounting in the State of West Virginia to..... | $233,659.29 | |
| And freight cars (including car trusts) amounting in the State of West Virginia to ..... | 353,972.66 | |
| And other cars of all class..... | 12,587.33 | |
| A total in West Virginia of... | $600,219.28 | |
| 12.4% of the first item $233,659.29 is..... | | 28,973.85 |
| Leaving a balance of..... | | 1,072,434.87 |

with which to meet the payment of interest, rentals and returns on capital invested.

| | |
|---|---|
| Accepting the plaintiff's figures, for the purpose of this calculation only, as to the total bonded debt as of June 30, 1908..... | 114,188,000.00 |
| And accepting its figures as to amount allottable to the State of West Virginia, on the basis of miles operated ..... | 33,537,244.00 |

53

| | |
|---|---|
| And accepting its figures as to the annual interest charge to the State of West Virginia..... | $1,402,706.09 |
| And accepting its figures as to the annual trackage and rentals paid by the complainant in West Virginia which amount to..... | 18,464.46 |
| And accepting its figures as to the total interest trackage and rental applicable to the State of West Virginia, amounting to..... (This covers both freight and passenger service.) | 1,421,170.55 |
| Allowing the high rate of 21.5% (see note c above) to cover passenger department, the passenger department would contribute ..... | 305,551.67 |

So that after the operating expenses of the passenger service are paid; after the taxes which should be bourne by the passenger service are paid; after the passenger service has paid its proportion of certain expenditures for permanent improvements, (which expenditures are not admitted by the State as being proper charged against earnings;) and after the passenger service has paid its proportion of interest on bonded debt and annual trackage and rentals, there yet remains, applicable to dividends on capital stock, the sum of. 766,883.20

from earnings in West Virginia.

| | |
|---|---|
| The total capital stock, covering entire lines is..... | 62,799,100.00 |
| The capital stock, chargeable to West Virginia on mileage basis ..... | 18,456,655.49 |
| The capital stock, chargeable to passenger service in West Virginia, at the high rate of 21.5% is..... | 3,968,180.93 |

So that $766,883.20 would pay more than 19% on the capital stock allottable to West Virginia for the passenger service.

These respondents deny the legal right of the plaintiff to segregate the passenger earnings from the other earnings of said company in determining whether said two cent passenger act operates as a confiscation of its property, and aver that the entire earnings from all sources should be considered in connection therewith.

54 Eighth. These respondents deny, as alleged in the eighth paragraph of plaintiff's bill, that the commercial value in respect to all classes of property is greater than the value for purposes of taxation; and they here aver, that said plaintiff corporation has reported as returned its said property to the Board of Public Works of West Virginia at its "True and actual value" for the year ending June 30, 1907, June 30, 1908, and June 30, 1909, as will fully appear by the oath of an officer of the plaintiff attached to the returns aforesaid in words and figures following, to-wit:

*"Oath.*

"STATE OF OHIO,
*County of Hamilton, ss:*

"I, the undersigned, G. B. Wall, Real Estate Agent of the Chesapeake and Ohio Railway Company, on my oath say that the return as shown on this and the foregoing sheets, and numbers 1 to — inclusive, has been prepared from the original books, papers and records of said company; that I have carefully examined the same, and declare the same and each sheet thereof to be complete and correct statement of the business and affairs of said Company in respect to each and every matter and thing therein set forth, and that all property owned, leased or operated in the State of West Virginia by said Company has been reported, and returned at its True and

Actual Value, to the best of my knowledge, information and belief, the words "true and actual value" being understood by me to mean that price for which the before mentioned property would sell if voluntarily offered for sale, upon such terms as such property is usually sold, and not the price which might be realized if said property was sold at a forced sale; and I further say that no deductions were made before stating the gross earnings or receipts herein set forth, except those shown in the foregoing accounts; and that there have been no expenditures for Permanent Improvements within
55 the State of West Virginia except as shown on form 12 of this report and that there have been no expenditures for Permanent Improvements on the Entire Lines except as shown on form 12 of this report; and that the accounts and figures contained in the foregoing return embrace all of the financial operations of said Company during the period for which said return is made.

(Signed) G. B. WALL,
[SEAL.] *Real Estate Agent.*

Subscribed and sworn to before me this 30th day of March, 1909.
(Signed) E. S. BRYANT,
*Notary Public, Hamilton County, Ohio.*"

That it is true, as alleged in said bill, in paragraph eight, that the Board of Public Works of West Virginia placed a valuation of $31,000,000.00 for assessment purposes on all of the plaintiff's property located within the limits of said State of West Virginia, for the years 1907, 1908, and 1909; and these respondents are informed, believe and so charge, that the calculations made by the plaintiff upon said assessment value, as set out in said paragraph eight, are incorrect and misleading, and the calculations made by the plaintiff in said paragraph eight, based upon said incorrect and misleading statements, are also incorrect and misleading.

These respondents deny, that the application of the Two Cent Passenger Act of West Virginia, complained of by the plaintiff, ever reduced its earnings below what fair and reasonable passenger rates and charges for the service rendered would producee and deny that said act has deprived the plaintiff of its property without just compensation and without due process of law, and denied to it the equal protection of the laws; and they further deny, that said Two Cent Passenger Act is "contrary to the Constitution of the State of West Virginia and of the Constitution of the United States,"
56 but these respondents aver, on information and belief, that the maximum rate of two cents per passenger per mile, allowed by said act complained of, is a fair, just and reasonable compensation for the services rendered by the plaintiff within the limits of the State of West Virginia.

Ninth. These respondents further deny, that the rates, fares, and charges of the plaintiff, in effect at the time of the passage of said Two Cent Passenger Act complained of, were not higher than a fair and reasonable compensation for the services rendered in the State of West Virginia by said plaintiff to the public; but aver that said

rates, fares and charges were excessive and extortionate for the value of the property used in connection therewith and for the service rendered.

These respondents admit, that the plaintiff has the right to charge a fair and reasonable compensation for the property used, or the services rendered; but they deny to the plaintiff the legal or equitable right to base its charges on the value of any of its property not used in the operation of its railroad proper, and aver that it cannot fix its rates with a view solely to its own interests on inflated or fictitious value of property, or on an arbitrary and unjust apportionment of its operating and other expenses. And these respondents still further deny, that the effect of said Two Cent Passenger Act has been, or will be, to reduce the charges of the plaintiff below what is a fair and reasonable charge for the present value of property used therefor, or a fair value for the services rendered; and deny that said act is confiscatory and violative of the Constitution of the State of West Virginia, or the Constitution of the United States, as alleged in the ninth paragraph of the plaintiff's bill.

Tenth. That it may be true, as alleged in the tenth para-
57 graph of plaintiff's bill, that the average rate per passenger per mile is less than the maximum rate, and that the average rate per passenger per mile received by the plaintiff for the fiscal year ending June 30, 1908 was 1.786 cents; and that the average rate per mile in the United States for the year 1907 was 2.04 cents; and it may be true that the average rate per mile, eliminating the "Central Northern States," was 2.33 cents; and the average rate per mile in the "Southern Atlantic States," was 2.42 cents; that it may also be true, as alleged in said paragraph ten, that its average freight rate is the lowest comparative rate in the United States; but these respondents are informed, believe and so charge, that on the going into effect of the Two Cent Passenger Rate complained of, plaintiff materially raised its freight rates to shippers in the State of West Virginia, assigning as a reason therefor the reduction of its passenger rates by said Two Cent Passenger Act; and notwithstanding said increase of freight rates, the complainant has failed and refused to lower the same since it has raised its passenger rates within the State of West Virginia, under the decree of this Court entered herein June 22, 1909. And these respondents further deny, that the effect of said Two Cent Passenger Act has been and is confiscatory to the plaintiff, as alleged in said tenth paragraph.

These respondents are further advised, believe and so charge, that notwithstanding the plaintiff raised its freight rates, which increased rates were in force during the year ending June 30, 1908, that its freight revenue for its entire system for the year ending June 30, 1908 decreased $403,251.69, as compared with its freight revenue for the year ending June 30, 1907, or a decrease of 2% of its entire freight revenue; and these respondents aver, that any reduction in freight revenue and passenger revenue that may have occurred to the plaintiff for the year ending June 30, 1908, was occasioned by
58 reason of the general business depression throughout the country; and they further aver, that the President of the Board of Directors of the plaintiff assigned said reason there-

for in the following language, found on page 17 of the Annual Report aforesaid, to-wit:

"The showing of Gross and Net Revenue for the first half of the fiscal year was quite favorable, there being an increase of $2,392,697.97 and $518,920.55, respectively. The business depression during the latter half, however, caused a loss of substantially the entire gain in gross revenue as above mentioned, and a total loss in net revenue of $490,029.36, it being impracticable to proportionately reduce the expenses without causing a deterioration in the physical condition of your property"

These respondents aver that notwithstanding the great depression in business, the passenger revenues of the plaint-ff for the year ending June 30, 1908, during the operation of said Two Cent Passenger Act, increased over the year ending June 30, 1907, during the operation of the Three Cent Passenger Act, $232,389.46, an increase in 1908 over 1907 of 4.8 per cent; and they further aver, that notwithstanding the revenue per passenger per mile charged by the plaintiff during the year ending June 30, 1908, was only 1.786 cents, yet the passenger revenue per train mile increased 6.8 per cent over the preceding year, which these respondents submit was brought about by the stimulation of passenger traffic because the plaintiff reduced its passenger fares.

Eleventh. These respondents deny, on information and belief, that the rates charged by the plaintiff and in existence at the time the act complained of went into effect, were equitably adjusted in their relation between its interstate rates and its intrastate
59 rates in West Virginia; and deny that its charges in West Virginia at that time were just and reasonable in themselves; and deny that said intrastate rates in West Virginia did not give to the plaintiff more than "a just and reasonable return upon the value of its property used in the transportation service which it renders to the public."

These respondents deny the allegation of the plaintiff's bill in paragraph eleven, where it avers that West Virginia has no right to reduce the plaintiff's rates lower than the rates charged by it in other States; but aver that this State has such rights. They further deny that the statute complained of has destroyed the "proper adjustment of its intrastate rates in West Virginia and its intrastate rates generally," and deny that such act is "an undue discrimination" in favor of intrastate passenger traffic in West Virginia over the intrastate passenger traffic carried by the plaintiff, for the reason, as alleged above, that the maximum passenger rate per mile in West Virginia as provided in said act is two cents, while the average rate per mile on the entire system of the plaintiff is only 1.786 cents per mile, a rate voluntarily fixed by the plaintiff.

These respondents further deny, that said act complained of gives an undue discrimination in favor of the intrastate passenger traffic of West Virginia over its interstate business; and they further deny, that said act regulates and burdens interstate passenger traffic in violation of the commerce clause of the Constitution of the United States.

These respondents are informed, believe and so charge, that the act complained of does not affect the interstate business of the complainant, as alleged in the eleventh paragraph on pages 18, 19, 20 and 21 of the plaintiff's bill, and here ask for full and complete proof of its allegations thereon.

Twelfth. That it is true, as alleged in the twelfth paragraph of plaintiff's bill, that each violation by the plaintiff of the act
60 complained of would subject it, upon conviction, to a minimum fine of fifty dollars and a maximum fine of five hundred dollars for each offense; but these respondents deny that the provisions of said act deprive the plaintiff of the equal protection of the law; and they deny that said act is a denial to it of due process of law; and they deny that said act is contrary to the provisions of the Constitution of West Virginia and to the Fourteenth Amendment to the Constitution of the United States, as alleged by the plaintiff.

Thirteenth. That it is true, as alleged in the thirteenth paragraph of plaintiff's bill, that it is the owner of the Coal River Railway, and that the mileage thereof is in addition to the mileage set out in paragraph one of said bill; but these respondents are informed, believe and so charge, that said Coal River Railway tracks connect with and is operated as a part of the main line of the plaintiff, and was, at the filing of this suit, in contemplation of law a part of the system of the plaintiff; and that said Coal River Railway, being operated in connection with it, under lease or otherwise, is considered a part thereof in contemplation of the act complained of; and these respondents are advised, believe and so charge that the said Coal River Railway Company property has, since the institution of this suit, been purchased and taken over by the complainant and was, at the time of the institution of this suit and is now, considered by the plaintiff a part of its system. And, on information and belief, these respondents further aver, that said Two Cent Passenger Act complained of does not reduce its revenues to work a confiscation of its property, as alleged in said paragraph.

Fourteenth. These respondents deny the right of the plaintiff to prevent the enforcement of the act complained of through equity by injunction, and aver that the plaintiff has a full, adequate and complete remedy at law in the defense of any and all prosecutions that might be instituted against it for the violation of said
61 act; and they deny that the enforcement of said act against the plaintiff by criminal prosecution would materially affect the value of its stock and bonds, or interfere with the performance of its duties as a public carrier, including the carrying of freights and passengers.

Fifteenth. These respondents deny, that said Two Cent Passenger Act complained of has caused a confiscation of plaintiff's property, in violation of any State or Federal Constitution or Statutory provision; and they aver that the plaintiff was, since said act went into effect and at the time the preliminary injunction was issued herein, receiving a reasonable return upon the value of its property devoted to the public use and for the services rendered; and further aver

that said Two Cent Passenger Act is constitutional and valid in all respects, and that the rates imposed thereby are fair and reasonable, and the penalties imposed for a violation thereof not excessive.

These respondents further aver, that each and all of them are citizens and taxpayers of their respective counties and of the State of West Virginia, and as such are a part of the travelling public, and frequently travel as passengers on the railroad of the plaintiff, and especially on that part of said railroad located in West Virginia, and that the passenger rate per mile now being charged by the plaintiff for intrastate West Virginia transportation is unfair and unreasonable for the property used therefor or for the services rendered; and they say that said preliminary injunction, issued by the Court herein on the 22nd day of June, 1909, ought, in right and justice to these respondents and the travelling public generally, be dissolved and a rate restored not exceeding that provided in said Chapter 41 Acts of the Legislature of West Virginia of 1907.

These respondents deny that the plaintiff has made a cause authorizing the interference of a court of equity, and here again deny the right of the plaintiff to enjoin them from enforcing
62 said act.

*Prayer.*

And now, having answered said bill as fully as these respondents are advised it is material for them to answer, they pray that said preliminary injunction may be dissolved as to each and all of these respondents; that the bill in these proceedings be dismissed; and that a decree be entered compelling the plaintiff to receive, redeem and pay for, as presented to it or to its agents or officers, the coupons issued by it under the order of this Court entered herein on the 22nd day of June 1909; that a mandatory injunction be issued herein to these respondents and to all other citizens and taxpayers of West Virginia and the travelling public generally, commanding the plaintiff to restore an intrastate West Virginia charge of not exceeding two cents per mile, or fraction thereof, for each passenger and ordinary baggage, as provided in said Act; that the plaintiff be enjoined from further violating said chapter 41, Acts of the Legislature of West Virginia of 1907, and that these respondents recover of and from the plaintiff, The Chesapeake and Ohio Railway Company, their costs in this behalf most wrongfully expended. And as in duty bound they will ever pray, etc.

WM. G. CONLEY,
*Attorney General, State of W. Va.*
S. B. AVIS,
*Prosecuting Attorney, Kanawha County.*
C. L. ESTEP,
*Prosecuting Attorney, Boone County.*
JEAN F. SMITH,
*Prosecuting Attorney, Cabell County.*
GEORGE LOVE,
*Prosecuting Attorney, Fayette County.*
J. S. McWHORTER,
*Prosecuting Attorney, Greenbrier County.*

63 R. D. STEED,
*Prosecuting Attorney, Lincoln County.*
E. H. GREEN,
*Prosecuting Attorney, Logan County.*
R. L. KEADLE,
*Prosecuting Attorney, Monroe County.*
S. R. KING,
*Prosecuting Attorney, Nicholas County.*
F. R. HILL,
*Prosecuting Attorney, Pocahontas County.*
C. C. KNAPP,
*Prosecuting Attorney, Putnam County.*
HUGH A. DUNN,
*Prosecuting Attorney, Raleigh County.*
T. N. READ,
*Prosecuting Attorney, Summers County.*
D. B. HARDWICK,
*Prosecuting Attorney, Wayne County.*
By COUNSEL.

WM. G. CONLEY,
*Attorney General, State of West Virginia.*

——— ———,
*Prosecuting Attorney, Kanawha County.*

64 STATE OF WEST VIRGINIA,
*Kanawha County, To-wit:*

William G. Conley, one of the defendants named in the foregoing answer, being duly sworn, says that the facts and allegations therein contained are true, except so far as they are therein stated to be on information, and that so far as they are therein stated to be upon information, he believes them to be true.

WM. G. CONLEY, *Defendant.*

Taken, sworn to and subscribed before me in my said County of Kanawha, this 8th day of June, 1910.

J. L. HEIZER,
*Notary Public.*

My commission expires Sept. 26, 1916.

(The exceptions referred to in the foregoing order are in the words and figures following, to-wit:)

STATE OF WEST VIRGINIA,
*Kanawha County, ss:*

In the Circuit Court Thereof. In Chancery.

THE CHESAPEAKE AND OHIO RAILWAY COMPANY, a Corporation Organized and Existing under the Laws of the State of Virginia and a Citizen and Resident of said State, Doing Business in the State of West Virginia,

VS.

W. G. CONLEY, Attorney General of the State — West Virginia; S. B. AVIS, Prosecuting Attorney of Kanawha County, et als.

65 Exceptions to the Answer of the Defendants Filed to the Plaintiff's Bill of Complaint in the Circuit Court of Kanawha County, West Virginia.

Now comes the plaintiff herein and excepts to the Defendants' Answer in this cause because the same shows that the Plaintiff is entitled to the relief prayed for in its Bill, and that the Defendants are not entitled to the affirmative relief prayed for in their said answer, upon the following grounds:

First. Because the Answer shows and admits that the Plaintiff is operating a line of railroad through the States of Virginia, West Virginia, and Kentucky, and into the State of Ohio, and as such, is engaged as a common carrier in Interstate business and is subject to the regulations of the Interstate Commerce Laws of the United States regulating carriers engaged in Interstate traffic and that the act of the Legislature of the State of West Virginia Complained of by the Plaintiff in its Bill, and set up by the Defendants in their Answer, necessarily regulates, controls, and imposes burdens upon the railroad, and upon Interstate traffic carried on by said Railroad in the carrying of passengers along its said line, and the said act, while upon its face purports only to affect intrastate traffic, as a matter of fact does regulate and impose burdens upon Interstate traffic, and upon the carrier herein:

Second. Because the Answer shows upon its face that while ostensibly referring only to State traffic, it controls, regulates, and imposes rates and burdens upon the carrier contrary to the Act of Congress in such cases made and provided, and enables and permits Interstate passengers to avail themselves under the law of the State of different rates from those prescribed by law under the
66 direction of the Interstate Commerce Commission.

Third. Because the said Act of the Legislature of the State of West Virginia, as set out in said Answer is in violation of Section First of Article 14 of the Constitution of the United States, and denies the equal protection of the laws to all persons within the jurisdiction of the State in this: That the Act is only made applicable to certain railroads of a certain class, and such classification as set out in said Act and Shown by said Answer is unreasonable, unfair, and unjust, and is a mere arbitrary selection imposed by the Legislature of the State of West Virginia.

Fourth. Because the said Act of the Legislature sought to be enforced and set up in the Answer of the Defendants is a denial of equal protection of the laws of the United States to the Plaintiff, and is forbidden by the Fourteenth Amendment to the Constitution of the United States.

In consideration the Plaintiff prays that the said Answer be stricken out as showing no defense to the Plaintiff's Bill, and that a decree may be entered as prayed by the plaintiff in its said Bill.

All of which is respectfully prayed.

THE CHESAPEAKE AND OHIO RAILWAY COMPANY,
By CHILTON, MacCORKLE & CHILTON.
SIMMS, ENSLOW, FITZPATRICK & BAKER.

67 (The Demurrer referred to in the foregoing order is in the words and figures following, to-wit:)

STATE OF WEST VIRGINIA,
*Kanawha County, ss:*

In the Circuit Court Thereof.

CHESAPEAKE & OHIO RAILWAY COMPANY, a Corporation Organized and Existing under the Laws of the State of Virginia and a Citizen and Resident of said State, Doing Business in the State of West Virginia, Plaintiff,

vs.

W. G. CONLEY, Attorney General of the State of West Virginia; S. B. Avis, Prosecuting Attorney of Kanawha County, West Virginia, and Others, Defendants.

*The Demurrer of the Plaintiff to the Answer of the Defendants Filed in this Cause.*

And now comes the plaintiff and for demurrer to the answer of the defendants filed herein, says the same is not sufficient in law.

And for further and special causes of demurrer says:

First. Because the Answer shows and admits that the plaintiff is operating a line of railroad through the States of Virginia, West Virginia, and Kentucky, and into the State of Ohio, and as such, is engaged as a common carrier in Interstate business and is subject to the regulations of the Interstate Commerce laws of the United States regulating carriers engaged in interstate traffic, and that the act of the Legislature of the State of West Virginia complained of by the Plaintiff in its Bill, and set up by the Defendants in their Answer, necessarily regulates, controls, and imposes burdens upon the railroad, and upon Interstate traffic carried on by said
68 Railroad in the carrying of passengers along its said line, and the said act, while upon its face purports only to affect intrastate traffic, as a matter of fact does regulate and impose burdens upon Interstate traffic, and upon the carrier herein.

Second. Because the Answer shows upon its face that while ostensibly referring only to State traffic, it controls, regulates, and imposes rates and burdens upon the carrier contrary to the Act of Congress in such cases made and provided, and enables and permits Interstate passengers to avail themselves under the law of the State of different rates from those proscribed by law under the direction of the Interstate Commerce Commission.

Third. Because the said act of the Legislature of the State of West Virginia as set out in said Answer is in violation of Section First of Article 14 of the Constitution of the United States, and denies the equal protection of the laws to all persons within the jurisdiction of the State in this: That the Act is only made applicable to certain railroads of a certain class and such classification as set out in said Act and shown by said Answer is unreasonable, unfair, and unjust, and is a mere arbitrary selection imposed by the Legislature of the State of West Virginia.

Fourth. Because the said Act of the Legislature sought to be enforced and set up in the Answer of the Defendants is a denial of equal protection of the laws of the United States to the plaintiff, and is forbidden by the Fourteenth Amendment to the Constitution of the United States.

Wherefore the plaintiff prays judgment as in its original bill it has already prayed.

CHESAPEAKE & OHIO RAILWAY COMPANY,
By CHILTON, MacCORKLE & CHILTON &
SIMMS, ENSLOW, FITZPATRICK &
BAKER,
*Attorneys & Solicitors.*

69 STATE OF WEST VIRGINIA,
*Kanawha County, ss:*

I, Ira H. Mottesheard, Clerk of the Circuit Court of said County and in said State, do hereby certify, that the foregoing is a true transcript of so much of the Record in the cause of Chesapeake and Ohio Railway Company vs. Wm. G. Conley, Attorney General, et al., as I was requested by counsel to certify.

Given under my hand and the seal of said Court this 5th day of July 1910.

IRA H. MOTTESHEARD,
[SEAL.] *Clerk Kanawha Circuit Court.*

70 And on the same day, to-wit, at a special term of the Supreme Court of Appeals, held at Charleston, Kanawha County on the 11th day of July, 1910, the following order was made and entered, to-wit:

CHESAPEAKE & OHIO RAILWAY COMPANY, Plaintiff Below,
vs.
W. G. CONLEY, Attorney General, et als., Defendants Below.

From Kanawha County.

This day came the plaintiff, Chesapeake & Ohio Railway Company, by Simms, Enslow, Fitzpatrick & Naker and W. E. Chilton, its attorneys, and prayed that a writ of error be allowed it from the former order of this Court this day entered, refusing to grant the appeal prayed for, on the ground that by such refusal of this Court to grant said appeal to the decree of the Circuit Court of Kanawha County, pronounced on the 28th day of June, 1910, the said decree of the said Circuit Court of Kanawha County became final, and in support of said motion the said Chesapeake & Ohio Railway Company filed its petition asking that the writ of error may issue to the Supreme Court of the State of West Virginia, which is the highest court of the State of West Virginia, for the correction of the alleged errors complained of, and to the said refusal of this Court to allow said appeal, by which refusal said decree of the Circuit Court of Kanawha County became and is the final judgment of the courts of this state, and that a duly authenticated transcript of the record, proceedings and papers herein may be sent to the Supreme Court of the United States, and in connection with said petition for a writ of error filed its several assignments of error; whereupon this Court, being of opinion that the Chesapeake & Ohio Railway Company is entitled to a writ of error as prayed for, and to an appeal to the Supreme Court of the United States, allows the same, upon the condition that the said Chesapeake & Ohio Railway Company, or some one for it, execute a bond in the penalty of One Thousand Dollars, conditioned according to the statute.

71 Whereupon, F. B. Enslow, for and on behalf of the Chesapeake & Ohio Railway Company, with Herbert Fitzpatrick as surety, in open court entered into a bond in the penalty of One Thousand Dollars, conditioned that the plaintiff in error shall prosecute its said writ of error to effect and answer and pay all costs and damages which may be adjudged if it shall fail to make good its plea, which said bond is to have the effect of a supersedeas, and the injunction awarded by the Circuit Court of Kanawha County is to continue in effect.

To the judgment of the Court in awarding the aforesaid writ of error to the Supreme Court of the United States, Robinson, President, and Poffenbarger, Judge, dissent.

72 STATE OF WEST VIRGINIA, *To wit:*

I, Wm. B. Mathews, Clerk of the Supreme Court of Appeals of said State, do hereby certify that the foregoing is a true, correct and complete transcript of the record in the case of the Chesapeake & Ohio Railway Company vs. W. G. Conley, Attorney General, and others, upon petition for appeal from the Circuit Court of Kanawha

County, lately pending in said Court, as fully as the same appears of record and on file in my said office.

Given under my hand and the official seal of the said Court, at Charleston, this 18th day of July, 1910, and in the 48th year of the State.

[Seal Supreme Court of Appeals, West Virginia.]

WM. B. MATHEWS,
*Clerk Supreme Court of Appeals of West Virginia.*

73 In the Supreme Court of Appeals of West Virginia.
In Equity.

THE CHESAPEAKE & OHIO RAILWAY COMPANY, Complainant,
vs.
W. G. CONLEY and Others.

To the Honorable the Judges of the Supreme Court of Appeals of West Virginia:

Comes now the above named, The Chesapeake & Ohio Railway Company, a corporation, and says:

That on the 28th day of June, 1910, a decree in this case was entered by the Circuit Court of Kanawha County against it, The Chesapeake & Ohio Railway Company, and that the said decree was final; and that thereafter on the 11th day of July, 1910, proper petition for appeal from the said Circuit Court of Kanawha County was presented to the Supreme Court of Appeals of West Virginia, the highest court in the said state, and that the said petition was considered and on the 11th day of July the said appeal prayed for was refused and denied by this Court, and that the said action of the said Supreme Court is final; that the said The Chesapeake & Ohio Railway Company is aggrieved that in the said judgment and in the proceedings had prior thereto in this case certain errors were committed to its prejudice; that this is an action involving directly the constitutionality of Chapter 41 of the Acts of 1907 of the Legislature of West Virginia, under Article 14 of the Amendments to the Constitution of the United States, and involves further directly the constitutionality of the said Act, because the same interferes
74 with and imposes burdens and restrictions upon the interstate commerce transacted by this petitioner, and that the decision thereon of the Supreme Court of Appeals of West Virginia is against the constitutional right claimed by this petitioner and as is verily believed is contrary to the Constitution of the United States; all of which will more fully appear in detail from the assignment of errors filed herein.

Wherefore the said The Chesapeake & Ohio Railway Company prays that a writ of error may issue to the Supreme Court of the State of West Virginia for the correcting of the errors complained of, and that a duly authenticated transcript of the record, proceed-

ings and papers herein may be sent to the United States Supreme Court.

CHILTON, MacCORKLE & CHILTON,
SIMMS, ENSLOW, FITZPATRICK & BAKER,
*Attorneys for The Chesapeake & Ohio Railway Company, Petitioner.*

75 In the Supreme Court of Appeals of West Virginia.

In Equity.

THE CHESAPEAKE & OHIO RAILWAY COMPANY, a Corporation, Plaintiff,

vs.

WILLIAM G. CONLEY and Others, Attorney General of West Virginia, Defendants.

*Assignment of Errors.*

Now comes the complainant, The Chesapeake & Ohio Railway Company, and files herewith its petition for a writ of error, and says that there are errors in the records and proceedings of the above entitled case, decided by the Supreme Court of Appeals of the State of West Virginia, on the 11th day of July, 1910, which said Court is the highest Court in the State of West Virginia in which said case could be heard and determined; and the said complainant, The Chesapeake & Ohio Railway Company, for the purpose of having the same reviewed by writ of error in the Supreme Court of the United States, makes the following assignment of errors:

First. The Supreme Court of Appeals of West Virginia erred in refusing to grant an appeal from the final decree of the Circuit Court of Kanawha County, rendered on the 28th day of June, 1910.

Second. The Supreme Court of Appeals of West Virginia erred in refusing to grant an appeal from the judgment and final decree, rendered by the Circuit Court of Kanawha County, on the 28th day of June, 1910, and further erred in holding by such refusal that Chapter 41 of the Acts of 1907 of the Legislature of the State of West Virginia was valid and constitutional.

76 Third. The Supreme Court of Appeals of West Virginia erred by the refusal to grant an appeal from the decree of the Circuit Court of Kanawha County, entered on the 28th day of June, 1910, by such refusal denying to this complainant, The Chesapeake & Ohio Railway Company, the rights claimed by it under Article 14 of the Amendments of the Constitution of the United States, in that it held that the said Act, Chapter 41 of the Acts of 1907, Session of the Legislature of West Virginia, was valid and constitutional and not in conflict with Article 14 of the Amendments to the Constitution of the United States.

Fourth. The Supreme Court of Appeals of West Virginia erred by

its final decree, entered on the 11th day of July, 1910, refusing to grant appeal from the decree of Circuit Court of Kanawha Co., W. Va., of June 28, 1910, so denying to this complainant the right to transact and carry on interstate commerce, free from the burdens and restrictions imposed by Chapter 41 of the Acts of 1907, Legislature of West Virginia, by such refusal holding that the said act was constitutional and valid.

Fifth. The said Supreme Court erred on the 11th day of July, 1910, in not reversing the judgment of the trial court and in not giving to the plaintiff in error its rights under the statutes, laws and Constitution of the United States.

Wherefore for these and other manifest errors, appearing in the record, the said The Chesapeake & Ohio Railway Company, plaintiff in error, prays that the judgment of the said Supreme Court of Appeals be reversed and set aside and held for naught, and that this complainant, the plaintiff in error, do have judgment granting it its rights under the laws and Constitution of the United
77 States; and the said plaintiff in error also prays judgment for its costs.

CHILTON, MacCORKLE & CHILTON,
SIMMS, ENSLOW, FITZPATRICK &
BAKER,
*Attorneys for The Chesapeake & Ohio Railway Company, Plaintiff in Error.*

78 In the Supreme Court of Appeals of West Virginia.

In Equity.

THE CHESAPEAKE & OHIO RAILWAY COMPANY,
vs.
W. G. CONLEY and Others.

Comes now The Chesapeake & Ohio Railway Company, above named, on this the 11th day of July, 1910, and files and presents to this Court its petition praying for the allowance of a writ of error intended to be urged by it, and praying further that a duly authenticated transcript of the record, proceedings and papers upon which the judgment herein was rendered may be sent to the Supreme Court of the United States, and that such other and further proceedings may be had in the premises as may be just and proper, and praying that the said case may be reviewed by the Supreme Court of the United States; and filed also its assignment of error setting forth certain errors alleged to have been committed by the Supreme Court of Appeals of the State of West Virginia; and upon consideration of the said petition, the said writ of error is allowed and granted, and it is ordered that the same do issue upon the execution of bond by The Chesapeake & Ohio Railway Company, or someone for it, payable to the State of West Virginia, in the sum of One Thousand Dollars ($1,000.00), with the condition that the said plaintiff in error shall prosecute its said writ of error to effect, and answer and

pay all costs and damages that may be adjudged if it shall fail to make good its plea, said bond when approved to act and operate as a supersedeas to the judgment of the Supreme Court of Appeals
79 of West Virginia, rendered as above recited on the 11th day of July, 1910, and upon the giving of such bond the injunction herein heretofore awarded by the Circuit Court of Kanawha County shall remain in full force and effect.

Given under my hand this 11th day of July, 1910.

IRA E. ROBINSON,
*President, and as such Chief Justice of the Supreme Court of Appeals of the State of West Virginia.*

80 Know all men by these presents: That we, F. B. Enslow, a responsible person for the Chesapeake & Ohio Railway Company, as principal, and Herbert Fitzpatrick, as surety, are held and firmly bound unto the State of West Virginia in the sum of One Thousand Dollars, to the payment of which well and truly to be made we bind ourselves, our heirs, executors and assigns, jointly and severally, firmly by these presents. Sealed with our seals and dated this 11th day of July, 1910.

The condition of the above bond is such, That, whereas, the Chesapeake & Ohio Railway Company seeks to prosecute its writ of error to the Supreme Court of the United States to reverse a certain judgment rendered by the Circuit Court of Kanawha County, on the 28th day of June, 1910, from which said judgment the Supreme Court of Appeals of West Virginia refused an appeal on the 11th day of July, 1910, wherein said Chesapeake & Ohio Railway Company was plaintiff and William G. Conley, Attorney General of West Virginia, and others, defendants;

Now, therefore, the condition of the above obligation is such, That if the above named Chesapeake & Ohio Railway Company, plaintiff in error, shall prosecute its said writ of error to effect, and answer and pay all costs and damages that may be adjudged if it shall fail to make good its plea, then this obligation to be void, otherwise to remain in full force and effect.

F. B. ENSLOW. [SEAL.]
HERBERT FITZPATRICK. [SEAL.]

STATE OF WEST VIRGINIA,
*County of Kanawha, To wit:*

Herbert Fitzpatrick, being duly sworn, on his oath says that he is of lawful age and a citizen of West Virginia, and knows the contents of the foregoing instrument to which his name is signed and attached; and further, that he is worth more than the sum of
81 One Thousand Dollars, over and above all debts, liabilities and exemptions.

HERBERT FITZPATRICK.

Subscribed and sworn to before me this 11th day of July, 1910.

A. M. BELCHER,
*Notary Public.*

My commission expires Aug. 17, 1915.

7—657

The above bond is approved, this 11th day of July, 1910.

IRA E. ROBINSON,
*President and as Such Chief Justice of the Supreme Court of Appeals of West Virginia.*

82 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Supreme Court of Appeals of the State of West Virginia:

Because, in the records and proceedings, as also the rendition of a judgment in a plea which is in the said supreme court of appeals of the State of West Virginia, before you, on the 11th day of July, 1910, thereof, between The Chesapeake & Ohio Railway Company, plaintiff, versus W. G. Conley, Attorney-General of West Virginia, and others, defendants, a manifest error has happened, to the great damage of the said plaintiff, The Chesapeake & Ohio Railway Company, as by its complaint appears.

We being willing that error, if any has been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Supreme Court, together with this writ, so that you have the said record and proceedings aforesaid, at the City of Washington, D. C., and filed in the office of clerk of the United States Supreme Court on or before thirty days from the date hereof, to the end that the record and proceedings aforesaid being inspected, the United States Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable John Marshall Harlan, acting Chief Justice of the Supreme Court of the United States, this 11th day of July, 1910.

83 Done in the City of Charleston, with the seal of the circuit court of the United States for the southern district of West Virginia attached.

[Seal Circuit Court United States, Southern District West Virginia, Charleston, West Va.]

EDWIN M. KEATLEY,
*Clerk Circuit Court United States, Southern District of West Virginia.*

Allowed.

IRA E. ROBINSON,
*President and Chief Justice of the Supreme Court of Appeals of the State of West Virginia*

84 *Citation.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States to Wm. G. Conley, Attorney General of the State of West Virginia; S. B. Avis, Prosecuting Attorney of Kanawha County; C. L. Estep, Prosecuting Attorney of Boone County; Jean F. Smith, Prosecuting Attorney of Cabell County; George Love, Prosecuting Attorney of Fayette County; J. S. McWhorter, Prosecuting Attorney of Greenbrier County; R. D. Steed, Prosecuting Attorney of Lincoln County; E. H. Green, Prosecuting Attorney of Logan County; R. L. Keadle, Prosecuting Attorney of Monroe County; S. R. King, Prosecuting Attorney of Nicholas County; F. R. Hill, Prosecuting Attorney of Pocahontas County; C. C. Knapp, Prosecuting Attorney of Putnam County; Hugh A. Dunn, Prosecuting Attorney of Raleigh County; T. N. Read, Prosecuting Attorney of Summers County; and D. B. Hardwick, Prosecuting Attorney of Wayne County, Greeting:

You are hereby cited and admonished to be and appear at and before the Supreme Court of the United States, at Washington, D. C., within thirty (30) days from the date hereof, pursuant to a writ of error filed in the office of the Clerk of the Supreme Court of the State of West Virginia, wherein The Chesapeake & Ohio Railway Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why judgment rendered against the said plaintiff in error, as in said writ of error mentioned, should not be corrected and reversed, and why speedy justice should not be done the parties in that behalf.

85 Witness the President and Chief Justice of the Supreme Court of the State of West Virginia, this 11 day of July, 1910.

IRA E. ROBINSON,
*President and as such Chief Justice of the Supreme Court of West Virginia.*

86 Due and legal service of the within and above citation is hereby accepted for W. G. Conley, Attorney General of the State of West Virginia; S. B. Avis, Prosecuting Attorney of Kanawha County; C. L. Estep, Prosecuting Attorney of Boone County; Jean F. Smith, Prosecuting Attorney of Cabell County; George Love, Prosecuting Attorney of Putnam County; Hugh A. Dunn, Prosecuting Attorney of Greenbrier County; R. D. Steed, Prosecuting Attorney of Lincoln County; E. H. Green, Prosecuting Attorney of Logan County; R. L. Keadle, Prosecuting Attorney of Monroe County; S. R. King, Prosecuting Attorney of Nicholas County; F. R. Hill, Prosecuting Attorney of Pocahontas County; C. C. Knapp, Prosecuting Attorney of Putnam County; Hugh A. Dunn, Prosecuting Attorney of Raleigh County; T. N. Read, Prosecuting Attor-

ney of Summers County; and D. B. Hardwick, Prosecuting Attorney of Wayne County, this 12th day of July, 1910.

WM. G. CONLEY,
*Attorney for Defendants.*

87 UNITED STATES OF AMERICA, *ss:*

Supreme Court of Appeals of West Virginia.

In obedience to the command of the within writ, I herewith transmit to the Supreme Court of the United States a duly certified transcript of the complete record and proceedings in the within entitled cause, wherein the Chesapeake & Ohio Railway Company was plaintiff and W. G. Conley, Attorney General, and others, were defendants, with all things concerning the same.

In witness whereof, I hereunto subscribe my name, and affix the seal of said Supreme Court of Appeals of the State of West Virginia, in the City of Charleston, this 18th day of July, 1910.

WILLIAM. B. MATHEWS,
*Clerk Supreme Court of Appeals of West Virginia.*

*Costs of Suit.*

In the Supreme Court of Appeals of West Virginia.

Plaintiff ..... $33.05

Attest:

WM. B. MATHEWS, *Clerk.*

Endorsed on cover: File No. 22,278. West Virginia Supreme Court of Appeals. Term No. 657. The Chesapeake & Ohio Railway Company, plaintiff in error, vs. W. G. Conley, Attorney General of the State of West Virginia, et al. Filed July 30th, 1910. File No. 22,278.

# No. 657

# SUPREME COURT OF THE UNITED STATES

## OCTOBER TERM 1910

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THE CHESAPEAKE & OHIO RAILWAY COMPANY,
PLAINTIFF IN ERROR,

*vs.* IN EQUITY

WILLIAM G. CONLEY, ATTORNEY GENERAL OF THE STATE OF WEST VIRGINIA, ET AL.,
DEFENDANTS IN ERROR.

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UPON WRIT OF ERROR

TO THE SUPREME COURT OF THE UNITED STATES UPON MOTION TO DISMISS OR AFFIRM, SET FOR DECEMBER 12TH, 1910.

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*Brief of Attorneys for The Chesapeake and Ohio Railway Company in opposition to said motion, and in support of its Writ of Error.*

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### STATEMENT.

The Chesapeake and Ohio Railway Company is a railway company engaged in interstate traffic, passing through the states of Virginia, West Virginia, Kentucky and into Ohio.

As such railway line, it owns and operates eleven branch lines, under fifty miles in length, and leases one seven and eighty-two hundredths (7.82) miles in length.

(See Printed Record, page 6.)

While engaged in operating its entire line under the direction and

control of the Interstate Commerce Commission, and the laws made by Congress governing same, the Legislature of West Virginia on the 20th day of February, 1907, passed an act in the words and figures following, to-wit:

CHAPTER 41.

(Senate Bill No. 15).

"AN ACT relating to and regulating passenger rates upon railroads in the State of West Virginia, and prescribing penalties for the violation thereof.

BE IT ENACTED BY THE LEGISLATURE OF WEST VIRGINIA:

'SEC. 1. That all railroad corporations organized or doing business in this state under the laws or authority thereof shall be limited in their charges for the transportation of any person with ordinary baggage, not exceeding one hundred pounds in weight, to the sum of two cents per mile, or fractional part of a mile, but the fare shall always be made the multiple of five nearest reached by multiplying the rate by the distance, and if for any one passenger the rates herein provided shall be less than five cents, the said sum of five cents may be charged as a minimum; children under twelve years of age shall be carried for one-half fare above prescribed; provided, that any passenger boarding a train at a station where tickets are sold, without having procured a ticket, may be charged an additional fare of ten cents, for which sum a rebate slip, redeemable in money, upon presentation to any ticket agent of the company, shall be issued and delivered to such passenger; and provided, further, that nothing in this act shall apply to any railroad in this state under fifty miles in length and not a part of, or under the control, management or operation of any other railroad, over fifty miles in length, operating wholly or in part in the state.

"SEC. 2. Any railroad company which shall charge, demand or receive any greater compensation for the transportation of any passenger than is authorized by this act, shall be fined for each offense not less than fifty dollars nor more than five hundred dollars; provided, that nothing contained in this act shall apply to electric lines and street railways owned or operated in this state.

"SEC. 3. All acts or parts of acts inconsistent herewith are hereby repealed."

Which act is hereinafter referred to for the sake of convenience as the "Two Cent Passenger Act."

This two cent passenger act went into effect the 21st day of May, 1907. After attempting to work under the same for about two years, on the 26th day of May, 1909, The Chesapeake and Ohio Railway Company filed its Bill of Complaint in the Circuit Court of Kanawha County, State of West Virginia, setting up the line of railway it operated, showing its entire line and total receipts from all branches for the year ending June 30th, 1908 after the two cent rate statute of West Virginia went into effect. This bill set up that the result of the application of the said two cent passenger act, and the imposition of said maximum rate of two cents per mile for the transportation of passengers had been confiscatory; had reduced its earnings below what reasonable passenger fares, rates and charges would produce; had deprived this complainant of its property without just compensation and without due process of law, and had denied to it the equal protection of the laws, all contrary to the Constitution of the State of West Virginia and of the Constitution of the United States, the benefit and protection of which were respectfully asked by the railway company. It further set up that the act in its operation occasioned a direct loss of revenue for the year ending June 30th, 1908, of not less than the sum of Three Hundred and Seventy-five Thousand, Seven Hundred and Three Dollars and Thirty-nine cents ($375,703.39); and for the six months ending December 31st, 1908, of not less than Two Hundred and Twenty-six Thousand, One Hundred and Fifty-five dollars and Forty-eight cents ($226,155.48). And further set up that it indirectly caused a still further loss because of the facility with which passengers could and did evade the requirements of the Interstate Commerce Act and the through rates by purchasing tickets -to local points and then using the ticket thus purchased as part of an interstate journey, thereby securing interstate transportation at less than the established lawful rate under the interstate tariffs duly filed with the Interstate Commerce Commission and published and posted according to law; and fully set out the manner in which the interstate commerce act-regulating fares were evaded by passengers under the West Virginia statute, by showing the number of passengers carried from one end of the state to the other, a distance of one hundred and ninety-six miles for the sum of Three dollars and Ninety cents ($3.90).

All of these facts will fully appear from the bill and the exhibits filed therewith, same being duly sworn to by George W. Stevens, President of the said company.

Upon this bill being filed in the Circuit Court of Kanawha County, West Virginia, the said court on the 22nd day of

June, 1909, entered a decree holding the said act of February 20th, 1907, herein referred to as the Two Cent Passenger Act, unconstitutional and void; and that the plaintiff was entitled to an injunction against the defendants, W. G. Conley, Attorney General of the State of West Virginia, and others, and such injunction was accordingly issued. This injunction was a permanent injunction made upon a hearing, the court holding, as recited, that the said law was unconstitutional on its face, and therefore, the injunction was made permanent.

No appeal was taken from this decision of the Circuit Court of Kanawha County, and the same continued in force for one year until on the 28th day of June, 1910, on which day W. G. Conley, Attorney General of the State of West Virginia, and others, filed an answer in said suit challenging the statement of the railway company as to its earnings, setting up that the said two cent rate statute was constitutional.

Upon the filing of this answer, The Chesapeake and Ohio Railway Company filed exceptions, stating that the said act complained of, while it on its face purported to affect only interstate traffic, as a matter of fact, as shown by the answer, did affect and impose burdens on interstate traffic and upon the defendant in said suit; and that while the two cent passenger act, on its face, ostensibly referred only to state traffic, it controlled, regulated and imposed burdens on the common carrier contrary to the act of Congress, and aided and permitted interstate passengers to avail themselves under the law of the sta e of different rates from those prescribed by law under direction of the Interstate Commerce Commission.

That the said act as set up in said answer was shown to be in violation of Section One, Article Fourteen of the Constitution of the United States, and denied the equal protection of the laws to all persons within the jurisdiction of the state in this: That the act was only made applicable to certain railroads of a certain class, and such classification as set out in said act and shown by said answer is unreasonable, unfair and unjust, and is a mere arbitrary selection imposed by the Legislature of the state of West Virginia.

Because the said act sought to be enforced and set up in the answer of the defendants is a denial of equal protection of the laws of the United States to the plaintiff, and is forbidden by the Fourteenth Amendment to the Constitution of the United States; and that all these facts were shown on the face of the answer.

This exception to the answer was heard in connection with the

demurrer of The Chesapeake and Ohio Railway Company filed in said cause, which set up substantially as ground for the demurrer the same facts showing unconstitutionality of the said two cent rate statute.

The Circuit Court of Kanawha County on a hearing, without any petition being filed for re-hearing its former decree, and contrary to practice in the State of West Virginia, entered a decree overruling the said demurrer and answer and replication of the defendant, and setting aside the injunction theretofore rendered in the cause, holding that the statute complained of was constitutional and dissolving the injunction and dismissing the plaintiff's bill.

The defendant, The Chesapeake and Ohio Railway Company, believing that the Circuit Court of Kanawha County erred: First; in setting aside a final judgment decree rendered more than a year prior, without any direct action being taken for that purpose. Second, in overruling the exceptions to the answer of the defendant, W. G. Conley, Attorney General of the State of West Virginia, and others, and overruling The Chesapeake and Ohio Railway Company's demurrer to said answer, appealed to the Supreme Court of the State of West Virginia.

That Court on the 11th day of July, 1910, entered an order refusing the appeal prayed for by the said The Chesapeake and Ohio Railway Company from the decision of the Circuit Court of Kanawha County pronounced on the 28th day of June, 1910, in the cause, sustaining the act complained of as constitutional, and refusing to perpetuate the injunction.

Thereupon, The Chesapeake and Ohio Railway Company, Plaintiff below, sued out a Writ of Error to this Court, directed to the Supreme Court of Appeals of West Virginia, and said appeal was duly filed July 30th, 1910, nineteen days after the same was rendered. The order rendered by the Supreme Court of West Virginia, refusing the appeal, and holding that the decision of the Kanawha County Circuit Court below was plainly right, was, insofar as the courts of West Virginia was concerned, final, as the Supreme Court of West Virginia is the Court of last resort in said state.

The errors assigned in obtaining the Writ of Error to the Supreme Court of Appeals of West Virginia, are as follows:

> First. The Supreme Court of Appeals of West Virginia erred in refusing to grant an appeal from the final decree of the Circuit Court of Kanawha County, rendered on the 28th day of June, 1910.
>
> Second. The Supreme Court of Appeals of West Virginia

erred in refusing to grant an appeal from the judgment and final decree, rendered by the Circuit Court of Kanawha County, on the 28th day of June, 1910, and further erred in holding by such refusal that Chapter 41 of the Acts of 1907 of the Legislature of the State of West Virginia was valid and constitutional.

Third. The Supreme Court of Appeals of West Virginia erred by the refusal to grant an appeal from the decree of the Circuit Court of Kanawha County, entered on the 28th day of June, 1910, by such refusal denying to this complainant, The Chesapeake and Ohio Railway Company, the rights claimed by it under Article 14 of the Amendments to the Constitution of the United States, in that it held that the said Act, Chapter 41 of the Acts of 1907, Session of the Legislature of West Virginia, was valid and constitutional and not in conflict with Article 14 of the Amendments to the Constitution of the United States.

Fourth. The Supreme Court of Appeals of West Virginia erred by its final decree, entered on the 11th day of July, 1910, refusing to grant appeal from the decree of Circuit Court of Kanawha County, W. Va., of June 28th, 1910, so denying to this complainant the right to transact and carry on Interstate commerce, free from the burdens and restrictions imposed by Chapter 41 of the Acts of 1907, Legislature of West Virginia, by such refusal holding that the said act was constitutional and valid.

Fifth. The said Supreme Court erred on the 11th day of July, 1910, in not reversing the judgment of the trial court and in not giving to the plaintiff in error its rights under the statutes, laws and Constitution of the United States.

From the foregoing statement, it will clearly appear that the constitutionality of the two cent passenger rate statute was attacked from every view-point, and that the matter was not only fully before the Court, but that the court which first held the said statute unconstitutional, afterwards without an appeal, and more than a year after the final judgment, entered another order vacating the former decree and held the said act to be constitutional.

The plaintiff below and plaintiff in error here contends in opposition to the plaintiff's motion to dismiss or affirm; that the entire statute complained of is invalid and unconstitutional; and that there

was reversible error in the decision of the Supreme Court of West Virginia in refusing to grant an appeal to the action of the Circuit Court of Kanawha County in dissolving the said injunction.

## ARGUMENT.

Upon this motion to dismiss or affirm, if the ruling of the Court in Jones v. Virginia, 139 U. S., 197, applies as well to a case where the record is printed as to one where it is not printed, the motion not containing any facts to enable the Court to pass understandingly upon the question, should be dismissed. If, however, the fact that the record is printed obviates any reference to it in the petition, then upon this motion the Court looks to the regularity of the Writ and to the question of jurisdiction.

Other motions of merit should await the final hearing of the cause and the discussion of the merits, (Sparrow v. Strong, 3 Wallace 105), and it is taken for true that under the rule with regard to motions, the motion to affirm is not entitled to consideration unless it is manifest that the Writ of Error was taken for delay only, or that the question on which the jurisdiction depends is so frivolous as to not need further argument. The scope, therefore, of the present hearing, is limited, and the Plaintiff in Error contends that the motion to dismiss or affirm should fail for the following reasons: First, the jurisdictional question has been properly presented and is in reality the pivotal point in the case. Second, there is no color of right to dismiss, and it is apparent that the Writ of Error was not taken for delay:

First: The jurisdictional question.

This case is in this Court under the United States Statute which describes in detail the nature of a case coming from a State Court to the Supreme Court of the United States for consideration, as follows: "Where is drawn in question the validity of the statute or an authority exercised under a statute on the ground of their being repugnant to the constitution, and the decision in favor of their validity."

In Murdock v. Memphis, 20 Wallace, 635, the essential elements were distinctly stated by Mr. Justice Miller to be that the constitutional question had been raised in the State Court, and there decided adversely to the claim of the plaintiff. If this be the rule applicable to the case at bar about the jurisdiction of this Court, it is submitted there should be no doubt. The Act of February 20th, 1907, was attacked as being unconstitutional. The Circuit Court of Kanawha County has held and enjoined its enforcement. Subsequently, the

Circuit Court of Kanawha County entered a decree holding it constitutional because of a decision in the meantime to that effect by the Supreme Court of Appeals of West Virginia in Coal & Coke Ry. Co. vs. Conley, 675E Report 613. Not only do the orders entered in the lower Court present the constitutional question, but in every pleading filed in that Court, in the petition for appeal, the petition for Writ of Error, and the assignment of error, it is alleged and charged that the Act attacked was void and of no effect, because contrary to Section One, Fourteenth Amendment to the Constitution of the United States; so that it is apparent that in this case every demand of both statute and decisions is met. This is not a case in which the validity of the statute has not been drawn in question on the ground of repugnancy to the Constitution of the United States, but, on the contrary, from the threshold of the cause until now that has been the only single point upon which every decision has turned. Upon page forty-five of the printed record, the order reciting the refusal of the appeal refers to the order entered by the Circuit Court of Kanawha County upon page twenty-six of the printed record, in which the Circuit Court recites that the injunction is dissolved and the bill dismissed, for the reason that the Act here involved *is* constitutional.

The second ground of attack upon the Two Cent Passenger Act was that the same was in direct conflict with the Constitution of the United States because the same denied to the complainant, The Chesapeake and Ohio Railway Company, the right to prosecute and carry on interstate commerce free from the burdens and restrictions imposed by said statute, and that imposing the same upon the carrier was a burden and restriction upon it as an interstate carrier, and affected not only the state, but interstate rates, and that this was shown by the answer upon its face, and that while ostensibly referring only to state traffic, the act did control, regulate, and impose rates and burdens upon the carrier contrary to the Acts of Congress and did permit interstate passengers to avail themselves, under the law of the state, of different rates than those prescribed by law, under the direction of the Interstate Commerce Commission. All that is necessary for the Court to see that the sole and only questions here involved are Federal questions, is to glance at the record, whether of the proceedings in the Circuit Court of Kanawha County, West Virginia, or in the Appellate Court of the State. The jurisdiction being so firmly fixed by the facts of this record, in accordance with the authorities, let us look at the second point presented.

Second: Before a motion to affirm will be entertained there must be color of right to dismissal.

This, it is contended, does not exist, but even though it did, it is here apparent that the motion to affirm should not be sustained, because the appeal is plainly not taken for delay. It is submitted that this charge comes with poor grace from the defendants in this cause. As before stated, the Bill was filed by the Plaintiff in Error on the 26th day of May, 1909, and so far as the record recites, the parties defendant took no step to present an Answer until the 28th day of June, 1910. The case was then heard with expedition, and nowhere does it indicate that the Plaintiff in Error has failed in anything that might speed the cause. To charge that a Writ of Error is prosecuted for delay only, when delay is not only dangerous but can be of no advantage, is certainly not argument.

This Act applies to passenger traffic only. Under the order entered by the Circuit Court of Kanawha County (page twenty of the printed record) every ticket sold carries with it a rebate coupon. No matter when this case may be decided, the coupons so issued are, under the order of that Court, redeemable, and the passenger cannot, in any contingency, be the loser. On the contrary, the record discloses that the Plaintiff in Error here is a common carrier, with five hundred and forty miles of railroad lines in the State of West Virginia; that the amounts received from passenger traffic yearly are enormous, indicating the sale of a large number of tickets, the claim is that the law is unconstitutional and void. Under Section Two of the Act its breach means a fine for each offence of not less than Fifty Dollars nor more than Five Hundred Dollars, an amount such that no Company could successfully conduct its business subject to such possible loss. It is respectfully submitted that this of itself conclusively proves and establishes the second position here taken, that the Writ of Error is not being prosecuted for delay, and if not for delay, then the motion to affirm should not be sustained.

## Upon the Merits.

If it be proper at this time to refer to the merits of the case, the attention of the Court may be briefly called to the following authorities, it being remembered that the Act classifies railroads which are subject to it, providing that it is applicable to all railroad corporations doing business in the State, but further providing that nothing in the Act shall apply to any railroad in the State under fifty miles in length and not a part of or under the control, management or

operation of any other railroad over fifty miles in length operated wholly or in part in the State (it being admitted that this condition exists, page 26 of the printed record), and with the further proviso that its terms shall not apply to electric lines or street railways owned or operated in the State. It is contended that this classification is unconstitutional: firit, because arbitrary:

Smith v. Ames, 169 U. S. 466.
Santa Fe v. Ellis, 165 U. S. 150.
State v. Loomis, 115 Missouri, 307.

Second, because it is not based upon reasonable grounds:

Bell's Gap v. Pennsylvania, 134 U. S. 232.
Adams Express Co. v. Ohio, 165 U. S. 194.
Adams Express Co. v. Kentucky, 165 U. S. 171.
In re Grice, 79 Federal, 627.
Gray on Limitations. Generally under the subject of Equality.
Mayor v. Dargan, 45 Alabama, 310.
Frazier v. McConway, 82 Federal, 257.
Dundee Trust Co. v. Parrish, 24 Federal, 197.
Savings Society v. Multnomah Co. 169 U. S. 421.
Magoon v. Illinois Trust, 170 U. S. 283.
Kelly v. Pittsburg, 104 U. S. 78.
Palsen v. Portland, 149 U. S. 30.
Falbrook v. Bradley, 164 U. S. 112.
Southern Pacific Co. v. Barton, 170 Federal, 725.
Railroad Co. v. Story, 149 Federal, 504.
Lacy v. Armour Packing Co. 47 S. E. 55.
Chicago, Milwaukee & St. Paul Ry. v. Tompkins, 176 U. S. 173.
See note 89 Am. St. Rep. 530.
Cotting v. Goddard, 183 U. S. 87.

And in addition, particular stress is laid upon the fact that on account of the excessive penalties imposed by Section Two of the Act, the equal protection of the law is denied to the Railway Company, the Plaintiff in Error here, in violation of the Fourteenth Amendment to the Constitution of the United States.

Ex parte Young, 209 U. S. 154.

The Defendant in Error, in the brief in support of dismissal, cites as leading case Dow v. Beidelman, 125 U. S. 680, as the ground for the fact that classification of railroads based upon their length is

held to be a constant test. We beg leave briefly here to call the attention of the Court to the difference between the statute of the State of Arkansas, considered in that case, and the West Virginia Act in controversy here. It is true that in the Dow case the Court held that the statute classifying its railroad corporations by the length of their line was valid, but the Arkansas statute contained no provision limiting and settling a class of railways under fifty miles, which should be subject to the provisions of the statute, as is the case in the West Virginia Act. Under the West Virginia statute a railway line under fifty miles, if it is under the control, management, or operation of any other railroad over fifty miles, is not excepted. If length is to be the criterion and the basis on which the rate is named, why add the further limitation as to "control, management, or operation?" Would not the purpose of the law have been reached by the words "not a part of any other railroad" and do not the addition of the words "control, management and operation" indicate an arbitrary and an unjust classification, and is not the road that is being operated by a road over fifty miles discriminated against and placed in a different class than other railroads of like length?

This Court, in Cotting v. Kansas City Stock Yards, 183 U. S. 79, held that the statute of Kansas, in question in that cause, was in violation of the Fourteenth Amendment to the Constitution of the United States in that it applied only to the Kansas City Stock Yards, and not to other companies engaged in like business in Kansas, and thereby denied to that Company the equal protection of the law, and Justice Brewer, delivering the opinion in the Cotting case, and referring to Santa Fe Railway Company v. Ellis, 165, U. S. 150, said: "Arbitrary selection can never be justified by calling it classification. The equal protection demanded by the Fourteenth Amendment forbids this." The standard adopted under the West Virginia statute is not length, earning, or condition, but is simply ownership, operation, control, or management. If a fifty mile railroad is operated or controlled by one over fifty miles, then, and then only, does it come within the provisions of the West Virginia Act. If this is conceded, is not the ruling in the Cotting case conclusive? We respectfully submit that such selection is not justified. That the law in question, as shown on its face, and by the bill and record of the cause, is in violation of the provisions of the Interstate Commerce Act. That it imposes an unjust and unfair burden upon an interstate carrier, and is shown on its face to be unconstitutional. That its enforcement would deprive the complainant of the equal protection of the law demanded

by the Fourteenth Amendment, and deprive it of its property without due process of law.

We respectfully submit that the motion to dismiss or affirm should be overruled and the case heard after full argument upon the merits as disclosed by the record.

F. B. ENSLOW AND H. FITZPATRICK
of SIMMS, ENSLOW, FITZPATRICK & BAKER,
*Counsel for The Chesapeake & Ohio Railway Company.*

H. T. WICKHAM, General Counsel.
W. E. CHILTON, of Counsel

# In The
# Supreme Court of the United States
## OCTOBER TERM, 1910
## No. 657

THE CHESAPEAKE & OHIO RAILWAY COMPANY,
PLAINTIFF IN ERROR,

*vs.*

WM. G. CONLEY, ATTORNEY GENERAL OF THE STATE OF WEST VIRGINIA, ET AL.,
DEFENDANTS IN ERROR.

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*Brief of The Chesapeake & Ohio Railway Company in opposition to motion of defendants to advance cause.*

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### STATEMENT.

The Chesapeake & Ohio Railway Company, a common carrier of passengers, is engaged in transporting interstate passengers, as well as passengers within the State of West Virginia, and is subject to the Interstate Commerce Laws and to the supervision of the Interstate Commerce Commission and Courts.

After the passage of the Act of the Legislature of West Virginia on February 20th, 1907, commonly known as the "Two-cent Passenger Act," The Chesapeake & Ohio Railway Company, on the 26th of May, 1909, filed its bill in the Circuit Court of Kanawha County, seeking to enjoin the defendants below and defendants in error from enforcing the act and from instituting or bringing suits or prosecutions against it under said Act. This case was heard on the 22nd day of June, 1909, and a decree rendered in favor of the Railway Company holding the statute unconstitutional. More than a year after this, on the 28th day

of June, 1910, after the right to appeal from the final order on the part of the defendants had expired, the Circuit Court of Kanawha County, on motion of the defendants, entered an order dissolving the injunction and dismissing the case. The Railway Company then obtained an appeal to the Supreme Court of the State of West Virginia, and on the 11th day of July, 1910, the Supreme Court of United States refused an appeal and affirmed the decision of the lower Court. Upon the entry of this order of the Supreme Court a writ of error was sued out to the Supreme Court of West Virginia, and the case regularly docketed in this Court. The motion of the defendants in error to affirm or dismiss was continued by this Court until the cause could be heard on its merits, which hearing is now by the defendants in error sought to be advanced, for six separate reasons, set out in its motion for advancement.

## ARGUMENT.

This cause, unless it comes within the provisions of the Act of Congress passed June 30th, 1870, (Revised Statutes, Sec. 949), and the Rules of this Court in regard to advancement of causes, must await its turn upon the docket. The right to have cases advanced lies within the discretion of this Court, subject to the provision of Sec. 949 of the Revised Statutes and Rule 26. As stated in the case of Hoge vs. Richmond, etc., Railroad Company, 93 U. S. 1,

> "The statute is not imperative. It does not provide that all cases in which the execution of the revenue laws of the State is enjoined or stayed shall have preference over others upon the docket, but only such as, upon a showing, the Court is of the opinion should be heard. The Court must determine what is 'sufficient reason' for this preference, under all the circumstances of the case.
>
> "In the present crowded state of our docket, it is incumbent on us to take care that injustice is not done to 'private parties' by the unnecessary advancement

of causes affecting public interests. To that end we now hold, that we will not give preference to cases in which the execution of the revenue laws of a State is enjoined, unless it sufficiently appears that the operations of the government of the State will be embarrassed by delay."

Applying the principles enunciated in the above case, and the provisions of Section 7 of Rule 26, which provides that no other case shall be taken up out of the order on the docket as set down for any particular day, except under special and peculiar circumstances, to be shown by the Court, we respectfully submit that the defendants in error have not by any of their six reasons shown why this case should be advanced. There is nothing alleged or shown that the operations of the State government of West Virginia will be embarrassed by delay, as was shown in the case of Central Railroad Company vs. Bourbon County, 116 U. S. 538. Nor is there anything shown in the case at bar that brings this within the ruling of the Illinois Railroad tax cases referred to in Hoge vs. Richmond, 93 U. S. page 2.

In the case of Baltimore & Ohio Railroad Company vs. Marshall County Supervisors, this Court refused to advance the case, although important interests of the State of Virginia were involved in litigation.

In Huntington vs. Texas, (131 U. S. Appx. CX.), it was stated by the Governor of the State that the money represented by the bonds was a part of the school fund, and was much wanted for the schools. This was deemed sufficient to order the case advanced.

In the case at bar it is true the Supreme Court of West Virginia held, as stated in the first reason assigned by defendant's attorney for an early hearing, that the law was constitutional. It is from that holding of the Court of last resort that the writ of error was sued out and filed in this Court. It was done regularly and was allowed by the West Virginia Supreme Court for cause shown.

SECOND: Does the pendency of this suit in this Court, because it prohibits the Attorney General and the Prosecuting Attorneys of the several counties from enforcing a law declared

constitutional by the Supreme Court, under the decision of this Court, furnish any reason why the cause should be advanced? The Supreme Court of West Virginia, in Coal & Coke Railway Company vs. Conley et al, 67 W. Va. 129, where it held the Act of the Legislature complained of constitutional on its face held it invalid because confiscatory, so far as it affected the Coal & Coke Railway Company. In that case it was expressly held that neither the Attorney General nor the Prosecuting Attorneys, defendants, were called upon or required to enforce the penalties prescribed by said statute so long as any Railway Company was engaged in litigating its right. Therefore, until this Court passes upon the constitutionality of the Act in question, the defendants here have no duty to perform under the statute, and no obstacle is placed in the way of the defendants. They have no public duty to perform until the law is finally declared mandatory on the plaintiff.

This, we think, disposes of the second reason for an early hearing.

THIRD: Does the pendency of this suit in this Court which enables the plaintiff in error to continue in effect the rates theretofore charged for passenger travel in the State of West Virginia, under any view of the case, affect the rights of the State of West Virginia or bring it within the rule laid down in either the Illinois tax cases or the Texas school bond case? If the facts were as stated in clause third, that individuals paying the difference between the passenger fare charged and the two-cent fare, would lose the interest on their money, or lose the entire principal by their neglect to retain their coupons, does that fact show that the operations of a State government are embarrassed or delayed? And, merely because the questions involved may be of public importance, does that necessarily entitle the parties to a hearing in preference to others? Clearly it does not.

In Carter vs. Greenhow, 109 U. S. 64, the Court, in denying a motion to advance, held:

> "A case will not be taken up out of its order simply because it is of great public importance."

and stated:

"The questions involved may be of public importance, but that does not necessarily entitle the parties to a hearing in preference to others. Practically, every case advanced postpones another that has been on the docket three years awaiting its turn in the regular call. Under these circumstances we deem it our duty not to take up a case out of its order except for imperative reasons."

FOURTH: Does the further fact that because two other like suits are now pending with two other railroads in the same State, involving the same question and laws that are involved in the suit now pending in this Court, thereby making it a matter of great public importance, justify this Court in advancing the cause? It is not shown by the record what two cases are referred to by the attorneys for the defence; whether they are pending in the State or United States Courts; nor does it clearly appear that exactly the same facts may be involved. This Court might hold the law constitutional, and the West Virginia Court still hold it confiscatory as to the other roads, as it did hold in the Coal & Coke case, (67 W. Va. 129). Each case depends on the facts applicable to it and is independent of the others.

FIFTH: The application of the law is a matter to be decided by each Company for itself. The Chesapeake & Ohio obeys the law as decided in the Coal & Coke case in charging in excess of two cents, so long as there is no determination of its right by the court of last resort and there can be no illegal discrimination between railroad corporations doing business in West Virginia except under like conditions and like circumstances. Each road can, pending final decision of its "rights" charge, within the limits of the State, such rate as it may consider fair and just, taking into consideration the character of its road, the amount of its business, the length of haul, the cost of operating, etc. That which would be a fair rate on the Chesapeake & Ohio might be excessive on the Baltimore & Ohio; that which would be fair to the Coal & Coke might be unfair to the Chesapeake & Ohio, the Virginian, or the Norfolk & Western. Something more must be shown than that different rates are charged by differ-

ent roads, to show discrimination, or to furnish special and peculiar circumstances justifying the advancement of a cause.

SIXTH: A glance at the record of this cause will show that it is not evident that the writ of error was taken for delay only. The defendants in error permitted the matter to stand in the Circuit Court of Kanawha County on a final decree awarding an injunction for over a year, without any motion being made or pleas entered. Immediately after the Court set aside this final decree holding the statute unconstitutional, the plaintiffs without delay obtained a writ of error to the Supreme Court, which was thirteen days afterwards presented to the Supreme Court of Appeals. As soon as the Supreme Court of West Virginia refused the appeal, a writ of error was immediately sued out and docketed in this Court. We submit that the questions involved in this writ of error are important, and that the legality of the decision of the State Supreme Court is directly challenged, and is earnestly denied and will be vigorously contested. The state is not directly affected. The controversy is over the right of the railway company to charge passengers in the State of West Virginia a greater rate than two cents. The duty of the Attorney General of the State, or the Prosecuting Attorneys of the various counties, is only to prosecute the railway criminally if it disobeys the law, and the Supreme Court of West Virginia has decided that so long as the litigation is pending the railway companies are not guilty under the misdemeanor clause of the act in charging a greater rate than two cents. See C. & C. R. R. Co. vs. Conley, et al., 67 W. Va. 129.

The duty of the Prosecuting Attorneys to sue being suspended till the right to charge in excess of two cents is settled, the only interests involved in the cause are then the private interests of the passengers on the Chesapeake & Ohio railway who pay the increased rate, and the railway company which charges the same. No one so interested has intervened. Pending the litigation their rights are protected.

A cause involving private interests only, will not be advanced for hearing in preference to other suits on the docket. Sage vs. Central Railway Co. 93 U. S. 412, U. S. vs. Fossatt, 21 Howard 446. The only cases where this rule does not apply,

are those in which the question in dispute will embarrass the government while it remains unsettled. The Supreme Court of West Virginia having settled the question that there was no criminal prosecution to be set afoot until the action had been finally determined, the State will suffer no embarrassment, and really has no interest in the matter whatsoever. The question involves then, strictly private interests. It does not involve any hardship, and therefore, it is not within the rule allowing cases involving great hardships brought to the Supreme Court for revision, to be advanced on motion. Ex parte Robinson, 19 Wallace 505.

If the law is held unconstitutional, the Railway Company is then entitled to the rate it is now charging, if it is held constitutional, the Courts have protected the citizens of West Virginia by requiring the Railway Company to provide for the repayment. If, on the other hand, the Railway Company should have acquiesced in the decision of the West Virginia Supreme Court, and put in effect the two-cent rate, and then the statute had been declared, as the plaintiff believes it will be declared, unconstitutional, the Railway Company would have no recourse upon the passengers carried for the difference between the reasonable fare and the unjust rate imposed upon it by an unconstitutional Act. As a common carrier its duty was and is to protect itself against all ill-advised and unconstitutional legislation by appeal to the Court, and where the Constitution of the United States is called in question, it clearly has a right to an orderly proceeding in the Supreme Court without being accused of fighting merely for delay. The fight is only just beginning. If the law is held constitutional on its face, the Supreme Court of West Virginia has held that then a railroad operating under the law, may show that by the peculiar circumstances attending the operation of such road, the rate is not sufficient to give a fair return on the capital invested. The plaintiff in error asks no more than the law allows it.

The matter, as stated in the outset, is within the discretion of the Court, governed by the statute and the rules of the Court. If this Court can find any special or peculiar circumstances requiring that this case be taken up out of its order on the docket,

the plaintiff in error will cheerfully acquiesce in such decision, but the attorneys for the plaintiff in error submit that no one of the six reasons shown in any manner entitles the defendants to an advancement of the cause. Neither the defendants, the State, nor the citizens of the State can be injuriously affected by a regular, orderly hearing of the case.

Respectfully submitted,

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H. T. WICKHAM, *General Counsel.*
W. E. CHILTON, *of Counsel.*
SIMMS, ENSLOW, FITZPATRICK & BAKER, *Attorneys.*

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No. 22278

No. 357

# Supreme Court of the United States

## OCTOBER TERM 1910

THE CHESAPEAKE & OHIO RAILWAY COMPANY,
PLAINTIFF IN ERROR,

*vs.*

WM. G. CONLEY, ATTORNEY GENERAL OF THE STATE OF WEST VIRGINIA, ET AL.,
DEFENDANT IN ERROR.

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UPON WRIT OF ERROR.

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*Brief of Attorneys for The Chesapeake & Ohio Railway Company in support of Writ of Error granted herein.*

### STATEMENT.

The Chesapeake & Ohio Railway Company is engaged in interstate traffic, operating a line of railway passing through the States of Virginia, West Virginia, Kentucky, and into Ohio. As such railway line, it owns and operates eleven branch lines under fifty miles in length and leases one 7.82 miles in length, (see printed

record, page 6). While engaged in operating this entire line under direction and control of the Interstate Commerce Commission, and the laws made by Congress governing same, the Legislature of West Virginia, on the 20th day of February, 1907, passed an act as follows:

(CHAPTER 41, SENATE BILL NO. 15).

"AN ACT RELATING TO AND REGULATING PASSENGER RATES UPON RAILROADS IN THE STATE OF WEST VIRGINIA, AND PRESCRIBING PENALTIES FOR THE VIOLATION THEREOF.

BE IT ENACTED BY THE LEGISLATURE OF WEST VIRGINIA:

"SEC. 1. That all railroad corporations organized or doing business in this state under the laws or authority thereof shall be limited in their charges for the transporting of any person with ordinary baggage, not exceeding one hundred pounds in weight, to the sum of two cents per mile, or fractional part of a mile, but the fare shall always be made the multiple of five nearest reached by multiplying the rate by the distance, and if for any one passenger the rates herein provided shall be less than five cents, the said sum of five cents may be charged as a minimum; children under twelve years of age shall be carried for one-half fare above prescribed; provided, that any passenger boarding a train at a station where tickets are sold, without having procured a ticket, may be charged an additional fare of ten cents, for which sum a rebate slip, redeemable in money, upon presentation to any ticket agent of the company, shall be issued and delivered to such passenger; and provided, further, that nothing in this act shall apply to any railroad in this state under fifty miles in length and not a part of, or under the control, management or operation of any other railroad, over fifty miles in length, operated wholly or in part in the state.

"SEC. 2. Any railroad company which shall charge, demand or receive any greater compensation for the transportation of any passenger than is authorized by this act, shall be fined for each offence not less than fifty dollars nor more than five hundred dollars; provided, that nothing

contained in this act shall apply to electric lines and street railways owned or operated in this state.

"SEC. 3. All acts or parts of acts inconsistent herewith are hereby repealed."

Which act is hereinafter referred to for the sake of convenience as the "Two Cent Rate Act."

This "Two Cent Rate Act" went into effectthe 21st day of May, 1907. After attempting to work under the same for about two years, on the 26th day of May, 1909, The Chesapeake & Ohio Railway Company filed its Bill of Complaint in the Circuit Court of Kanahwa County, State of West Virginia, setting up the line of railway it operated, showing its entire line and total receipts from all branches for the year ending June 30th, 1908, after the two cent rate statute of West Virginia went into effect. This bill set up that the result of the application of the said "Two Cent Rate Act," and the imposition of said maximum rate of two cents per mile for the transportation of passengers had been confiscatory; had reduced its earnings below what reasonable passenger fares, rates and charges should produce; had deprived this complainant of its property without due compensation, and without due process of law, and had denied to it the equal protection of the laws, all contrary to the Constitution of the State of West Virginia, and of the Constitution of the United States, the benefit and protection of which were respectfully asked by the Railway Company. It further set up that the act in its operation occasioned a direct loss of revenue for the year ending June 30th, 1908, of not less than the sum of Three Hundred and Seventy-five Thousand Seven Hundred and Three Dollars and Thirty-Nine Cents ($375,703.39); and for the six months ending December 31st, 1908, of not less than Two Hundred and Twenty-six Thousand, One Hundred and Fifty-five Dollars and Forty-eight Cents ($226,155.48); and further set up that it indirectly caused a still further loss because of the facility with which passengers could and did evade the requirements of the Interstate Commerce Act and the through rates by purchasing tickets to local points and then using the ticket thus purchased as part of an interstate journey, thereby securing interstate transportation at less than the established lawful rate under the interstate tariffs duly filed with the Interstate Commerce Commission, and published and posted according to law; and fully set out the manner in which the interstate commerce act regulating fares was evaded by passengers under the West Virginia statute.

Under the twelfth, fourteenth and fifteenth clauses of the bill, the Railway Company sets up the excessive penalties imposed for violation of the act, and the fact that the prosecuting attorneys for the various counties and the Attorney General of the State had given notice to the Railway Company that they would prosecute it for each offence if the statute was disregarded. That by reason of the enormous penalties imposed by the statute, an effort was being made to prevent the Railway Company from having any judicial inquiry made into the validity of the statute, and to so burden any challenge thereof in the Courts of this State that the complainant and others affected thereby must necessarily submit rather than take the chances of the penalties imposed. Further allegation was made that the effect of these penalties and the legislation which imposed them, because no other person or business in the State of West Virginia was subjected to such penalties under similar circumstances, was to deprive the complainant of the equal protection of the law and was a denial to the Railway Company of due process of law, and therefore contrary to the provisions of the Constitution of the United States. In other words, the excessive fines imposed were in violation of Article Eight of the Constitution and therein of the Fourteenth Amentment, and the risk was too great. Whereupon the bill prayed that the defendant be enjoined from procuring or attempting to procure indictments against the Company and from instituting criminal proceedings against it because of its failure to observe and carry out the provision of the "Two Cent Rate Act."

All of these facts will fully appear from the bill and the exhibits filed therewith, same being duly sworn to by George W. Stevens, President of the said Company.

Upon this bill being filed in the Circuit Court of Kanawha County, West Virginia, the said Court on the 22nd day of June, 1909, entered a decree holding the said act of February 20th, 1907, herein referred to as the "Two Cent Rate Act", unconstitutional and void; and that the plaintiff was entitled to injunction against the defendants, W. G. Conley, Attorney General of the State of West Virginia and others, and such injunction was accordingly issued. This injunction was a permanent injunction made upon a hearing, the Court holding as recited, that the said law was unconstitutional on its face, and therefore the injunction was made permanent.

Prior to the date of the decree in this cause, the Circuit Court of Kanawha County, in the suit of Coal & Coke Railway Company vs. Attorney General, had decided that the statute was unconstitutional, and an appeal was then pending in the West Virginia Supreme Court. The Supreme Court having decided that the statute

was valid on its face, the defendants herein, on the 28th day of June, 1910, over the objection of the plaintiff, filed its answer to the bill, setting up that the two cent rate statute was constitutional. Upon the filing of this answer The Chesapeake & Ohio Railway Company filed its exceptions and a demurrer setting up that the act complained of, while on its face purporting only to affect interstate traffic did, as a matter of fact, and as shown by the answer, affect and impose burdens on interstate traffic, and upon the defendant in the suit as an interstate carrier. That while the two cent passenger rate, on its face, ostensibly referred only to interstate traffic, it necessarily regulated and imposed burdens on the plaintiff as an interstate carrier, contrary to the act of Congress, and aided and permitted interstate passengers to avail themselves under the law of the State, of different rates from those prescribed by law under direction of the Interstate Commerce Commission.

That the said act was only made applicable to certain railroads of a certain class, and such classification as set out in said act, and as shown by said answer, was unreasonable, unfair and unjust, and a mere arbitrary selection imposed by the legislature of the State of West Virginia.

Because the act sought to be enforced and set up in the answer was a denial to the plaintiff of the equal protection of the laws of the United States, and as such forbidden by the Fourteenth Amendment to the Constitution of the United States; and that all these facts were shown on the face of the answer.

The exception to the answer was heard in connection with the demurrer of the Railway Company filed in this cause, which set up substantially as ground for the same, facts showing unconstitutionality of the said two cent rate statute. The exceptions and demurrers on hearing were both overruled, and the answer filed.

Thereupon, the plaintiff, The Chesapeake & Ohio Railway Company, filed its replication to the answer, and the questions were submitted to the Court for determination. The Circuit Court of Kanawha County, on the hearing on June 28th, 1910, entered a decree setting aside the injunction theretofore rendered, and, following the decision of the Supreme Court of West Virginia in the Coal & Coke Company case, held the statute complained of constitutional, dissolved the injunction, and dismissed the plaintiff's bill. The plaintiff, The Chesapeake & Ohio Railway Company, believing that the Circuit Court of Kanawha County erred.

First: In setting aside the final judgment rendered more than a year prior without any direct action being taken for that purpose;

Second: In overruling the exceptions to the answer and in overruling the demurrer and rendering decree dismissing the plaintiff's bill, appealed to the Supreme Court of West Virginia.

The errors assigned in applying for appeal to the Supreme Court of West Virginia are set out on page three of the printed brief, and are substantially the same as those assigned in obtaining the writ of error from this Court to the Supreme Court of West Virginia.

The Supreme Court of West Virginia, on the 11th day of July, 1910, entered an order refusing the appeal prayed for by The Chesapeake & Ohio Railway Company from the decision of the Circuit Court of Kanawha County, pronounced on the 28th day of June, 1910, sustaining the statute complained of as constitutional, and refusing to perpetuate the injunction.

Thereupon, The Chesapeake & Ohio Railway Company, plaintiff below, sued out a writ of error from this Court, directed to the Supreme Court of Appeals of West Virginia, and the same being allowed, was duly filed here July 30th, 1910, nineteen days after the order entered by the Supreme Court of West Virginia refusing said appeal. The holding by the Supreme Court that the decision of the Kanawha County Circuit Court was plainly right was in so far as the courts of West Virginia were concerned, final, the said Supreme Court of West Virginia being the Court of last resort in said State, and, an appeal being refused, the decision of the Kanawha County Circuit Court of June 28th, 1910, became and was final.

The errors assigned in obtaining the writ of error to the Supreme Court of Appeals of West Virginia are set out on page forty-seven of the printed record, and are as follows:

> First: The Supreme Court of Appeals of West Virginia erred in refusing to grant an appeal from the final decree of the Circuit Court of Kanawha County, rendered on the 28th day of June, 1910.
>
> Second: The Supreme Court of Appeals of West Virginia erred in refusing to grant an appeal from the judgment and final decree, rendered by the Circuit Court of Kanawha County, on the 28th day of June, 1910, and further erred in holding by such refusal that Chapter 41 of the Acts of 1907 of the Legislature of the State of West Virginia was valid and constitutional.
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> Third: The Supreme Court of Appeals of West Virginia erred by the refusal to grant an appeal from the decree of the Circuit Court of Kanawha County, entered

on the 28th day of June, 1910, by such refusal denying to this complainant, The Chesapeake & Ohio Railway Company, the rights claimed by it under Article 14 of the Amendments of the Constitution of the United States, in that it held that the said Act, Chapter 41 of the Acts of 1907, Session of the Legislature of West Virginia, was valid and constitutional and not in conflict with Article 14 of the Amendments to the Constitution of the United States.

Fourth: The Supreme Court of Appeals of West Virginia erred by its final decree, entered on the 11th day of July, 1910, refusing to grant appeal from the decree of the Circuit Court of Kanawha Co., W. Va., of June 28, 1910, so denying to this complainant the right to transact and carry on interstate commerce, free from the burdens and restrictions imposed by Chapter 41 of the Acts of 1907, Legislature of West Virginia, by such refusal holding that the said act was constitutional and valid.

Fifth: The said Supreme Court erred on the 11th day of July, 1910, in not reversing the judgment of the trial court and in not giving to the plaintiff in error its rights under the statutes, laws and Constitution of the United States."

From the foregoing statement it will appear that the yalidity of the two cent rate statute was attacked from every viewpoint, and that the question of the constitutionality of the act was fully heard and passed upon, both by the Circuit Court of Kanawha County and the Supreme Court of West Virginia.

The questions raised by these assignments of error are, for convenience of discussion, stated as follows:

First: The statute in question is unconstitutional because of the fact that the penalties pronounced by the statute against any railway which shall fail to comply with the same, are so excessive as to bring the act within the inhibition of Article Eight of the Constitution of the United States, and under the Fourteenth Amentment to the Constitution of the United States deprives the plaintiff of its property without due process of law, and denies to it the equal protection of the law.

Second: The entire act is unconstitutional, because the classification thereby made of the railways makes the act applicable to certain railroads of a certain class, and such classification as set

out is unfair and unjust, and a mere arbitrary selection imposed by the Legislature without any relation to the alleged purpose of the act, and not based on any reasonable grounds.

Third: Because the act necessarily imposes a burden upon the plaintiff as an interstate carrier, and denies it the right to transact and carry on interstate commerce free from the burdens and restrictions imposed by the West Virginia two cent rate act.

## ARGUMENT.

After the decree of June 22nd, 1909, of the Circuit Court of Kanawha County, as heretofore stated the Supreme Court of the State of West Virginia, in the Coal & Coke Railway Company case, passed on the two cent rate act and by that decision, rendered March 8th, 1910, among other things, held that the statute, Chapter 41 of the Acts of 1907, was valid on its fact, but, in order to escape the inevitable conclusion that the penalties were of such an amount as would amount to a confiscation of the property of the Railway Company if it refused to obey the provisions of the statute, and thus, by the excessive penalties, bring the statute within the operation of the Eighth and Fourteenth Amentdmen to the Constitution of the United States, the Court, by a majority opinion held, in substance, that by the institution of a suit brought challenging the validity of the statute, the penal-clause of such statute had no application while the suit was pending in good faith for the determination of such question. The decsion of the Supreme Court of West Virginia in the Coal & Coke Company case established the right of a corporation or individual affected by a statute, to test the validity of the same, and upon such contest to obtain an injunction suspending the operation of the penal clause of such statute.

Relying upon the decision of the Supreme Court of the United States, in

Ex parte Young, 209 U. S. 123,

and the decision of the Supreme Court of West Virginia in Coal & Coke Railway Company vs. Conley, Attorney General, et als, there can be no question of the right of The Chesapeake & Ohio Railway Company to maintain the suit in the manner in which it was brought.

Taking, then, that it is conceded that the right to bring the suit is settled, it might be well at the outset to refer briefly to the condition and character of railroad traffic in the State of West Virginia, and to the facts affecting the application of the statute to the railway companies of the State. These facts appear in part from the bill and answer, and of the others the Court will take judicial notice.

In West Virginia there are 3,565.91 miles of steam railroads and 206.24 miles of electric railroads. Of the steam railroads there are 2518.41 miles of interstate roads, which include branches owned and controlled, managed or operated by them. For instance, of the Chesapeake & Ohio it includes the Loup Creek branch, running from Thurmond into the coal fields; the Cabin Creek branch, running from Chelyan; the Paint Creek branch; the Piney branch and other short lines. In other words, there are 2,518.41 miles of steam railroads in West Virginia, constituting the main line, branch lines and other railroads owned and controlled by such interstate lines within the State of West Virginia. Of railroads which are not interstate carriers but purely state railroads deriving their charters from the state and owning lines entirely within the state, there are 1047.50 miles. So that, of the steam railroads in the state 71% are owned, operated or controlled by the interstate roads, and 29% are owned, operated or controlled by purely state railroads. Of the first class, or interstate railroads, there are eight, the Chesapeake & Ohio, the Baltimore & Ohio, the Norfolk & Western, the Virginian, the Pennsylvania, the Wheeling & Lake Erie, the Western Maryland, and the Kanawha & Michigan. Of the purely state roads there are forty-seven which own trackage in the state. Of this latter class the trackage length varies from less than a mile, up to 183.58 miles.

Of the forty-seven railroads whose mileage is entirely in West Virginia there are but two which come within the provisions of the Act of 1907, prescribing a two cent fare as the maximum passenger rate, to-wit, the Coal & Coke railroad, with 183.58 miles of trackage, and the Coal River Railway with 51.31 miles of trackage, which has, since the act of 1907 was passed, become "a part of" another railroad, leaving the Coal & Coke Railway as the only purely state railroad coming within the act. Of the 206.24 miles of electric railway in West Virginia the greatest mileage of any one is 43.30 miles, although there are nineteen such electric railways operating within the state. For another division we note that of the fifty-five steam railroads in West Virginia, ten of them have fifty miles and over of railroad, and forty-five are under fifty miles in length.

About the year 1907 the spasm of *two-cent fare* seized legislators all over the country. Seemingly, as if it had been written upon sacred tablets and de. red as a divine command; or as if some mighty object lesson had impressed the wisdom and the necessity

of this specific rate upon the legislative mind; like the ludicrous story of the man possessed with the mania of a "buff-cut slip for a 2 cent fare" the slogan was repeated from Senator to Delegate till it was regarded as a sure index of a monopolist or a lobbyist to enquire whether or not such a flat, arbitrary rate was, in all cases and under all conditions fair and reasonable. One can well see that there is a marked difference between conditions prevailing upon lines between cities like Chicago, Cincinnati and St. Louis, or between Baltimore, Philadelphia and New York, and conditions between Sutton and Charleston or conditions between Huntington and Wheeling. There are admitted reasons why a new railroad, just beginning to develop a country can not carry the same number of passengers, and does not hope, therefore, to have the same net return per passenger per mile, as an older line which runs through a thickly settled country. It may well be supposed that in old states like Pennsylvania and New York, where there are hundreds of small towns, many large cities and a few great cities; where the lines run through thickly settled communities and passenger trains are usually crowded, a two cent rate, (seemingly the minimum which even the most radical demands for any steam railroad) would not be oppressive to the railroads. Notwithstanding the repeated holdings that the 14th Amendment protects railroads against a confiscatory rate, the long hauls and empty coaches of Texas, South Carolina and West Virginia, as compared with the short hauls and crowded coaches of New York, Pennsylvania, Connecticut and Rhode Island, did not move the legislators of the former group to note these very apparent differences in conditions of passenger traffic. If any inquiry into the subject were pursued in West Virginia, its results were never made public. The "two-cent" demand became a fad of legislators. Its advocates talked fast and loud and stood their ground. Legislators were "swept off their feet" in cold, thinly-settled South Dakota, in the prosperous, rich, thickly-settled states of Ohio and Pennsylvania. West Virginia "fell in line" and no one seemed to risk a call to duty till the Governor of New York vetoed such a measure, passed without any investigation of the facts. His subsequent triumphant re-nomination and election proved that the prevailing legislative habit was rather a passing fad than a deep sentiment and that the people are more enamored of justice and courage than of cheap attempts to make victims in legislation. But West Virginia could not be content with the universal slogan. It is unfair to Judge Burdett's opinion, and is an injustice even to the then prevailing fad, to

approach the West Virginia act of 1907 with the concession that it is a "two-cent fare law." We have examined the statutes in those states which are supposed to have been afflicted with the fad which is almost as famous under the name of the "fad of 1907" as a certain other public event was, as the "crime of '72." An examination of these statutes will show that nearly every one of them was passed in 1907; but every statute on this subject, which we have been able to find has general application, makes no discriminations, treats every railroad alike; and in the few cases where classifications are made, those classifications are founded upon a good reason, every road in each class is treated as are all others in that class, and there is no difficulty in assigning a railroad to its proper class from a physical examination of its property.

Alabama has a straight 2½c per mile rate, and has not an exception in it. (See General Acts Ala. 1907, Page 104. Act approved Feb. 14, 1907).

Illinois has a straight 2c per mile rate, without an exception in it. (See Laws of Ill. 1907, Page 476. Act approved May 27, 1907).

Pennsylvania has a straight 2c per mile rate, without an exception. (See Laws of Penn. 1907, Page 59. Act approved April 5, 1907).

North Carolina has a straight 2¼c per mile act which has the proviso that the Corporation Commission of North Carolina is authorized to permit "all independently owned and operated railroad companies in North Carolina, whose mileage of road in said State is sixty (60) miles or under, to charge a rate for transporting passengers not in excess of the present rate fixed and prescribed for said road" and the law permits newly constructed railroads to have the rate fixed by the Railroad Commission for a limited period. Note that the law has the general provision putting all railroads "owned, controlled and operated by lease or other agreement" in the class in which is the road which owns or controls the lesser railroad. (See Public Laws of N. C. Session 1907, Chapter 216, Page 250).

Iowa classifies railroads according to gross earnings per mile without any exception whatever.

Class "A" includes those whose gross annual earnings per mile are $4,000; class "B," $3,000; class "C", less than $3,000. Class "A" is limited to 2c per mile; class "B" to 2½c per mile; class "C" to 3c per mile, with a minimum charge of 10c, and a half fare rate for children 12 years or under. There is this provision which ap-

plies to the whole act: "In determining the classification of any railroad, the entire railroad property owned or operated by any company shall be considered as a single railroad, and the aggregate gross earnings of the entire railroad within the state shall be divided by the entire mileage owned or operated within the state, to ascertain the gross earnings per mile of such railroad." (See Laws of Iowa, 1907, Chapter 102. Approved Feb. 28, 1907).

Minnesota has a straight 2c per mile rate with a half rate for children under 12 years of age, without any exceptions. (See Laws of Minn. 1907, Chapter 97, Pages 109, 110. Approved April 4, 1907).

Missouri divides railroads into four classes, to-wit: Class "A," which includes "all through or trunk line railroads and all branch roads owned, leased or occupied by such through or trunk line railroads or corporations." Class "B," which includes "all other railroads or parts of railroads, owned, leased, controlled or occupied, or which may hereafter be owned, leased, controlled or occupied either wholly or in part, by any trunk line company or corporation." Class "C," which includes "all other railroads of a greater length than 45 miles; Class "D," which includes "all roads less than 45 miles in length, not owned, leased, controlled or occupied by any trunk line company or corporation." NOTE: It will be observed that this classification includes and embraces every class of railroad in the state, and there is no chance, by construction or otherwise, to put one short railroad in one class today, and in another tomorrow. The rate is fixed at 2c per mile for classes "A," "B," and "C"; and at 4c per mile for class "D." (See Laws of Mo. 1907, Page 171. Approved Feb. 27, 1907).

Nebraska has a straight 2c fare law applying to all railroads without exception. (See Laws of Neb. 1907, Chapter 92, Page 341. Approved March 6, 1907).

North Dakota has a straight 2½c per mile rate for distances exceeding six (6) miles with a reduced rate for children, the only exception being that the act "shall not apply to the transportation of passengers within the boundaries of any city by street railways." (Laws of N. D. 1907, Chapter 199, Page 327).

Ohio has a straight 2c per mile rate without any exception whatever. (See Laws of O. 1906, Page 4).

South Carolina has a straight rate of 3c which applies to "all railroads to which the provisions of this chapter shall apply," and the chapter applies to all railroads "engaged in this State as Common Carriers for passengers or hire." (See Laws of S. C. 1902,

Section 2165). This act was subsequently amended by the single proviso that any railroad not over 5 miles in length may be permitted by the Railroad Commission to charge 5c per mile. (See Acts of S. C. 1908, Number 469, Page 1047).

South Dakota has a straight 2c per mile rate without a single exception. (See Session Laws of S. D. 1909, Chapter 6, Page 8).

The fact that these other states did not make the exceptions, exemptions and discriminations that West Virginia did, does not prove that our act is bad; but we do start upon the consideration of the act of 1907 with the apparent fact that it is drawn upon no well-considered model, is unusual in its provisions and stands alone for judgment.

The act of West Virginia in Chapter 41, Acts 1907, is heretofore set out in full.

It is not contended that this Court can inquire into the wisdom or policy of the legislation in question. Whether it was wise legislation needed by the people or demanded by any conduct of the railroads cannot be discussed. The legislation must stand or fall upon the solution of the inquiry, does it infringe the Constitution and the Fourteenth Amendment? Our contention is that any enforcement of this statute, in addition to the individual cases in which it violates the Amendment by depriving any person of property without due process, will infringe that Amendment by denying to the plaintiff and to all other railroads in the State, similarly situated, the equal protection of the laws; and we stand boldly upon that proposition. This law makes an unreasonable, arbitrary, unjust and totally indefensible classification of railroads, or it so exempts certain railroads, as to make it repugnant to the rules laid down by the Supreme Court of the United States. More, it is a classification which is one thing in one part of the statute and another thing in another part.

There are so many inequalities, uncertainties and discriminations in the above exceptions to the statute that it is indeed difficult to determine which is the worst. The Court will notice the significance of the two words "under" and "over" in the above exceptions. For instance, a railroad under fifty miles in length is excepted, provided that such a railroad "under fifty miles in length" be not *a part of*, or *under the control, management* or *operation* of any other railroad "over fifty miles in length." If a railroad should be exactly fifty miles in length, it's in a peculiar situation. Such a railroad could be made the nucleus for linking together thousands of miles of trackage of railroads under fifty miles in

length. While the basic railroad of fifty miles would be regulated it could acquire a majority of the stock or could control and manage all of the roads under fifty miles in length that it might desire, and still none of such smaller railroads would be held to the two-cent rate.

Again, any railroad fifty miles or under in length can acquire the control or management of, or can operate, as many similar lines as it can acquire, and the entire system thus put together upon a management or operation basis would not be within the requirements of the 2c rate.

Some illustrations are interesting. The Kanawha & West Virginia railroad is a line running from the capital of the state, connecting with the Kanawha & Michigan, and extending thirty-three miles up Elk River paralleling the Coal & Coke Railroad for about twelve miles, and thence up Blue Creek. It is within the exception of the first section of the Act of 1907.

The West Virginia Midland railroad is another line, running from Holly Junction to Webster Springs, having about thirty-five miles of trackage. It connects with the Baltimore & Ohio system, but is a narrow gauge. If the Kanawha & West Virginia should purchase the physical property of the West Virginia Midland railroad, the latter would become "a part of" the former, although there could be no interchange of cars for two reasons:

First: Because they are not connected at any point; and,

Second: Because the gauges of the railroads are different.

If the Kanawha & West Virginia should purchase the stock control, or should take a lease for the management or operation of, the West Virginia Midland, then, no matter how the two railroads might be operated, neither would be compelled to put on a two cent rate, but both would be within the exception of the first section; yet if the Baltimore & Ohio should get a stock control of the West Virginia Midland, or should take a lease upon it by which the Baltimore & Ohio should manage and operate it, then at once, *ipso facto*, the West Virginia Midland railroad would be compelled to put on the two cent rate, and this would be true notwithstanding the fact that because the West Virginia Midland is a narrow gauge railroad there could be no continuous travel over it from the Baltimore & Ohio, and no interchange of cars. This means that if the Kanawha & West Virginia railroad should control the West Virginia Midland the latter would be exempted from the provisions of the act; but if the Baltimore & Ohio should get the same control

the West Virginia Midland would be compelled to adopt a two cent rate. If this is not a classification by ownership, what is it?

There are forty-four railroads in West Virginia which can "control, operate or manage" the West Virginia Midland railroad and the latter would be within the exception of the Act of 1907. There are ten railroads in the state whose "control, management or operation" of the same piece of property, which, by the very nature of the case, would be the same kind of management and operation as that of the other forty-four, and yet, in the case of the ten, the railroad would be within the requirements of the two cent law. This is unjust to the West Virginia Midland railroad, because a larger line wanting to purchase it would be handicapped by the act. It is unfair to the ten railroads, because it enables smaller railroads to combine operation and control under more favorable conditions in doing the same work.

The same injustice, inequality and unfairness in the practical workings of the act can be shown with dozens of combinations and cases possible under the railroad situation in this State. For instance, if the Kanawha & Michigan, which is a railroad over fifty miles in length, should purchase a majority of the stock of the Kanawha & West Virginia, the latter would at once go into the two cent class. Then, if the Kanawha & Michigan should sell that stock control to the West Virginia Midland, or to some other person, the Kanawha & West Virginia would pass again under the exemption of the Act. If the majority of this stock should again go to the Chesapeake & Ohio railway the Kanawha & West Virginia would again become a two cent fare railroad; then, if the Chesapeake & Ohio should sell the same stock to the Cranberry Railroad it would pass under the exemption of the Act. If the Act had said in the beginning that all railroads in this state shall be classified according to their "control, management or operation," an ownership classification would not have been more explicitly made than has been made by the Act in question. Take for example the Roaring Creek & Belington Railway. Being "managed or operated" by a railroad over fifty miles in length its rate is two cents. But if a road under 50 miles should take over this "control or management" then the Roaring Creek & Belington would not be in the two cent class. There is no doubt that even under Section 53 of Chapter 54 either railroad could lease the latter or "control or manage" it.

The question, then, is, whether such a classification of railroad or other property can be upheld. The Supreme Court of the United

States has laid down certain rules for these classifications which cannot be violated. *Raymond v. Chicago U. T. Co.*, 207 U. S. 20, enforces the rule that an assessment, no matter how made, which adopts a different method and fixes a different rate for certain corporations" "which results in enormous disparity and discrimination" denies equal protection of the laws. Whether classification be made formally in the statute or be necessarily implied by its exemptions, makes no difference in enforcing the guarantee of equal protection. The guarantee designed to place every person upon an equality before the law would soon be frittered away if the mere form of a statute or the administrative means employed, should be allowed to shield an arbitrary selection from the charge of discrimination. When a state law's palpable purpose, or, an administrative act's necessary result, is to let one or more do what others similarly situated cannot do; or subjects one or more to restrictions which others similarly situated are excused or relieved from doing, we have the essence of inequality and the essentials of discrimination, both of which are condemned by the Fourteenth Amendment.

No cast-iron rule as to the subjects which come within the equality clause of the Fourteenth Amendment has ever been or can be laid down. As is said in Brannon's Fourteenth Amendment, page 315, "it is difficult to say, in fact not safe to say" exactly what is meant by the term "equal protection of the laws."

> "It stands in the Constitution as a personal shield against all unequal, impartial legislation by states and injustice which follows from it, whether directed against the most humble, or most powerful; against the despised laborer from China, or the envied master of millions." Brannon 319; *Yick Wo v. Hopkins*, 118 U. S. 356.

Of course it is no longer open to debate that it protects corporations as well as natural persons, *Smith v. Ames*, 169 U. S. 466. *Santa Clara Co. v. R. R.*, 118 U. S. 394. The case of *Dow v. Beidelman*, 125 U. S. 680 is urged by the Defendants as an adjudication which sustains the legislation in question in this case. But any investigation of that case will show that all that was there decided was that the state has power to regulate railroad rates (a proposition not controverted) and that in exercising that power the state may divide railroads into classes according to the length of the lines so that the class to which any particular railroad would belong would be determined by the length of the railroad. The

Arkansas legislature in that case divided railroads into three classes: first, those fifteen miles in length; second, those from fifteen to seventy-five miles in length; third, lines over seventy-five miles in length; and a different rate for passenger service was fixed for each class. There was no exception or exemption of any railroad or class of railroads in the state. It made no difference whether the railroad was standard gauge, narrow gauge, operated by steam or electricity, branch or main line. How the railroad was *managed, operated* or *controlled* made no difference. Every road in the state was, by a simple rule, assigned to a class, and every railroad in that class fared *exactly alike*. It is not urged here that the state may not *classify*, but that it may not *discriminate*. We do not argue that the legislature had not power to classify all the railroads in the state according to mileage, but that the legislature, instead of doing so, has passed a law and confined its operation to a few railroads; and has *exempted* more than it has *regulated;* has made the *class* in some instances depend upon "control, management or operation," and inflicted a penalty upon railroads over fifty miles in length which is not inflicted upon other railroads.

The doctrine laid down in *Bluejacket v. Scherr*, 50 W. Va. 533 is in accord with the doctrine of *Dow v. Beidelman, supra*, that is, that the state can classify, and may make a difference in classes, but, no matter what may be the form of the regulation, or the terms of the statute, the basis upon which any classification is made is always subject to review by the courts. This rule is recognized by state and federal authorities. In *Nicholas v. Walter*, 37 Minn. 264 the rule is thus put:

> "That the classification shall be made upon some apparent natural reason, some reason suggested by necessity, by such a difference in the situation and circumstances of the subjects placed in different classes as suggests the necessity or propriety of different legislation with respect to them."
>
> Again, "The mere fact of classification is not sufficient to relieve the statute from the reach of the equality clause of the fourteenth amendment, and in all cases it must appear, not merely that a classification has been made, but also that it is based on some reasonable ground —something which bears a just and proper relation to the attempted classification and is not a mere arbitrary selection." *Gulf &c. Railway v. Ellis*, 165 U. S. 150. *McGoun v. Ills.*, 170 U. S. 283. Brannon, p. 323.

"It means that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or other classes in the same place and under like circumstances." *Missouri v. Lewis*, 11 Otto 22.

It "only requires the same means and methods to be applied impartially to all the constituents of a class, so that the law shall operate equally and uniformly upon all persons in similar circumstances."

Brannon, 323;
Ken. R. R. Tax cases, 115 U. S. 321;
*Home Co. v. N. Y.*, 134 U. S. 594;
*Atchison v. Mathews*, 174 U. S. 105.

*State v. Broodbelt*, 89 Md., 565, 73 Am. St. 201;
*N. Y. v. N. Y. Clearing House*, 179 U. S.;
*Am. Sugar Co. v. Louisiana*, 179 U. S. 89.

In *Railway v. Mackey*, 127 U. S. 205, it is held sufficient,

"If all persons subject to it are treated alike under similar circumstances and conditions in respect both to the privileges conferred and the liabilities imposed."

In 127 U. S., 205 and 175 U. S. 348 fellow servant acts which applied to railroads only were upheld.

But in these cases, and similar ones, the Supreme Court held that the peculiar dangers incident to railroad employment, justified the legislature in nullifying, as to railroads, the doctrine of fellow servant. But no one would contend that the legislature could withhold that defense from *some* railroads and allow it to *others*. A law of that kind limiting its application to railroads "over fifty miles in length" would be clearly bad because the "dangers" peculiar to one railroad would apply to all. What, then, could be said in favor of such a law which exempted from its provisions all railroads "under fifty miles in length" only when the latter were not "controlled, managed or operated" by another railroad "over fifty miles in length?"

The inhibition of the 14th amendment was designed "to prevent any person, or class of persons, from being singled out as a special subject for discriminating and hostile legislation." *Pembina v. Pennsylvania*, 125 U. S. 188.

"There cannot be distinctions in granting or enforcing rights, or in imposing burdens, that are arbitrary, unfair discriminations, those made under such circumstances as make them unequal, not called for by facts justifying such distinctions," Brannon page 322.

In the case of *Cotting v. Kansas City Stock Yards Co.*, 183 U. S. 85, the rule:

"Recognizing the right of classification of industries and occupations, we must nevertheless always remember that the equal protection of the laws is guaranteed, and that such equal protection is denied when upon one of two parties engaged in the same kind of business and under the same conditions burdens are cast which are not cast upon the other." See also *State ex rel, Richards v. Harmon*, 42 N. J. L. 435.

*Com ex rel, Fertig v. Patton*, 88 Pa. 258;
*Edmondson v. Herbrandson*, 14 L. R. A. 725;
*State ex rel v. Mitchell*, 31 Ohio St. 592;
*People ex rel v. Chatauqua*, 43 N. Y. 10;
*Smith v. L. & N. R. R.*, 75 Ala. 449;
*State ex rel v. Ramsey Co.*, 48 Minn. 236.

From the above decisions we feel justified in asserting that while the power to classify subjects of legislation cannot be questioned, still that power is subject to judicial reveiw. And if the courts find that the classification made is arbitrary, or is made upon a ground that has no "just and proper relation" to the attempted classification, or that the classification is a "mere selection" without reason, or that the classification is not "called for by facts justifying" it, or that the necessary effect of the legislation is to put one person or one property in a less desirable position or under greater burdens than another person or another piece of property similarly situated, then that such legislation cannot be upheld. No one would doubt that if the legislature should undertake to classify railroads according to the color of the cars which they operate, or by the diameter of the driving wheels of the locomotives, or by the kind of wood used for ties, or by the size of the depots or station houses, that such a classification would come under that condemnation pointed out by Judge Poffenbarger in *Bluejacket Co. v.*

*Scherr*, 50 W. Va. supra, because the ground of the classification had "no proper relation to the attempted classification."

It seems to us that the true rule for determining whether or not the grounds of the classification do bear a just relation to the subject in hand, demands consideration of the evil to be remedied, and of the remedy to be applied. The object of this legislation being to give the people relief, all classification should have some relation either to the evil of overcharge or to the remedy therefor. Therefore, the reason why classifying railroads according to the color of the cars or the diameter of the driving wheels should be condemned would be because such considerations would have nothing to do with the subject of excessive charges, nor with the rates which should be established, nor to the ability of the railroad to earn upon the high or the low rate. We take it also to be self evident from the principles laid down by the above authorities, that if an act of the Legislature should provide that all railroads having a capital of a million dollars and over should be in one class, and limited to one rate, and all railroads having a capital of less than one million dollars should be in a different class and be held to a different rate, it would deny the equal protection of the laws because the capital of the railroad would have no relation whatever to extortion from the people, nor to the reasonableness of a passenger rate. Besides the railroad with one million of capital could sell to the other having less than a million and thus change its class. If, then, the amount of the capital stock has no necessary relation to the classification of railroads for the purpose of fixing passenger rates, it may well be asked, what relation to that subject has the ownership of a railroad, or its *control*, *management* or *operation?* We venture to assert that no legislation can be shown from any of the states, attempting to regulate freight or passenger rates, in which a classification has been attempted which would put the same railroad in one class under one management, and, in a different class, under a different management. We go further and *challenge this legislation as standing alone among enactments of this kind.* Its like has never existed and does not exist. This is the only state, so far as we have been able to ascertain, which has ever passed a law undertaking to deal with railroads, under which law the same railroad could be in one class today, and in another class tomorrow. It would seem to us to be a safe rule, indeed we cannot conceive of anything which could be said in criticism of the rule, that any classification of property or corporations should be such that, from an accurate, detailed description of the corporation or

property, anyone could, from that description alone, determine in which class the corporation or property belongs.

For instance, in the classification of corporations in West Virginia, for the purpose of assessing license taxes, which was discussed in *Bluejacket v. Scherr* 50 W. Va., anyone can, from a description of the corporation or from the certificate of incorporation, determine whether the corporation is in the one class or in the other. A single illustration will suffice to determine the point that ownership is in many instances the sole basis of classification under the present West Virginia statute. Take, for instance, the Morgantown & Kingwood Railroad, which is forty-eight miles in length. Describe it with the accuracy required by any taxing department, and add to this description all the details which could be demanded by a purchaser, such as the length of the railroad, the character of the rails, ties and ballast, sidings, depots and stations; number and kind of cars, locomotives and other equipment; number and kind of machine shops, turn tables and all other such property; and the number and kind of its stores, personal and real property; the cost of the railroad as a whole, its cost per mile and the cost of every piece of property which it owns, and all the work that has been done upon it; the source and amount of income received for all freight hauled and the kinds of freight; the number of passengers transported, the charge per mile, the amount received from the sale of tickets and from cash fares; the total gross receipts and net receipts; the number of bridges, viaducts, trestles, culverts, the kind of each and what each and all cost; the territory traversed by the railroad, the population, wealth, factories and industries of every town, city and county through which the railroad passes; the amount of the stock, bonds, bills receivable and bills payable. It would seem to the ordinary mind that if the rule that all classification should have "a just and proper relation" to the subject to be classified, and if any respect shall be paid to the ruling that a classification shall not be a mere "arbitrary selection," then, the above description of the Morgantown & Kingwood railroad would be sufficient to enable any person of ordinary understanding with the statute before him, to determine what passenger rate can be charged by that railroad. But, not so under the West Virginia Act. There is still necessary, before it can be assigned to its class, that there shall be ascertained its "control, management or operation." If that "control, management or operation" shall be in any one of ten railroads in the state it is within the two-cent class. If, on the other hand, that "control, management or operation" be with any

one of forty-five other railroads in the state, then it is within the exception of the Act, and is in another class. It is impossible to escape the conclusion that the same piece of property is, by the Act in question, put in one class under one management, and in a different class under a different management. Is not this the same as saying that the *control, management* or *operation* fixes the status before the law of every railroad in West Virginia under fifty miles in length? It seems to us impossible to escape the conclusion that the rate to be charged on forty-five railroads out of the fifty-five steam railroads in West Virginia, is a matter which is not determined by anything affecting the business, the character, the earning capacity, the location or the length of the road; but entirely upon their "control, management or operation"; and that the class to which each may be assigned may change from day to day, and from time to time as the "control, management or operation" may change.

Unless, therefore, the equal protection clause of the Fourteenth Amendment can be eluded by subterfuges and evasions, and unless classification can be made the pretext for arbitrary selection and unwarranted discrimination, the statute in question is *class legislation* of the very worst kind. Instead of being a classification of railroads it is a classification of *persons* who may "manage, control or operate" certain railroads, making it hard for some and easy for others.

One of the apologies for this statute is the contention that, if a railroad over fifty miles in length should get the control or management of another railroad under fifty miles in length it would make a merger of the less with the greater, and that the same thing would occur if a railroad under fifty miles in length should secure the control or management of another railroad under fifty miles in length. And we take it that those who advance this argument would contend that in the latter case if the combined mileage of the two smaller railroads should make more than fifty miles, then that that combined mileage would come within the two-cent class. There are many answers to this contention. The first answer is that it does violence to the words, the context, the subject matter, and the reason and spirit of the law in question. If there should be a merger of railroads it must be brought about in the way provided by section 53, chapter 54 of the Code (Section 2346.)

This last section allows the lease or the purchase of one railroad by another, and it also permits a merger under certain circumstances. One railroad can purchase another although they may

not connect, if by another line the one can be reached from the other. We take it that under this act the Kanawha & Michigan railroad at Charleston could purchase or lease the Roaring Creek & Belington railroad became by way of the Coal & Coke "a continuous line" could be made. But a merger of a railroad can be accomplished only in the way set out in the statute. A lease or a purchase of one railroad by another is quite a different thing from a merger. If one railroad leases another or purchases a control of the stock of another, the corporate identity of such other railroad is not thereby destroyed. There may be a large minority stock interest which would consent to the lease or to the stock control but object to the merger; and section 53 of chapter 54 recognizes this consideration; and even in a case of a merger it requires a certain stock interest to vote in favor of it, and it provides for the preservation of franchises and any special privileges which the leased or purchased railroad may have. There are some charters in the state which were granted by the old state of Virginia, some that were granted by the state of West Virginia under special acts of the legislature. There are many railroads in the state having special contracts, privileges or immunities which do not pass by conveyance but are personal to that corporation and can be enjoyed only by the original grantee thereof. See Chesapeake & Ohio *Railway v. Miller*, Auditor, 114 U. S. 176. Besides there are many railroad corporations having special grants from counties, cities, towns or villages; and there are some in which such municipal bodies have subscribed to the stock or bonds as authorized by the laws of West Virginia. In all these cases it is the right of minority stockholders to insist that the corporate identity and integrity of these railroads be preserved. These corporation mergers are not always desirable anyhow, and that is why the legislature has made a merger of two railroads a most solemn act. But from the words of the Act it can be shown that the legislative intent was to preserve existing railroad corporations. In exempting railroads under fifty miles in length it provides that the exemption of such railroads shall take place only under four conditions:

*First.* When the railroad is "*not a part of*" some other railroad over fifty miles in length.

*Second.* When it is not under "*the control of*" another railroad over fifty miles in length.

*Third.* When it is not under "*the management of*" another railroad over fifty miles in length; and

*Fourth.* When it is not under "*the operation of*" another railroad over fifty miles in length.

If two railroads be merged, then, by the merger, one becomes "a part of" the other. The first exception is, as to railroads which are "part of" another and includes those cases where a merger has taken place under the statute, or where one railroad has purchased the physical property of another. The case of "control" would occur where one railroad had acquired a majority of the stock of another. The "management" of one railroad by another, or the "operation" of one railroad by another, would occur under a lease, or a management or operation contract; and these are recognized under section 53 of chapter 54. The words used in the statute are plain, well understood English. There would have been no use of the words "control," "management" and "operation" if the words "part of" meant the same thing. If the legislative idea, therefore, was that under the exception to the statute it was meant that when any lines of railroad should be brought under the same management or operation, the combined mileage should be the basis of classification, strange terms indeed, for bringing about such a result were used. All that would have been necessary to have accomplished that result would have been to put in the enacting clause a provision that in determining the mileage of a railroad, lines "controlled, managed or operated" should be included. But an amendment to do this very thing was defeated. See House Journal, 526-527.

It seems to us too plain for argument that the legislative intent was to except from the operation of the act railroads under fifty miles in length, either on account of the clamor from the smaller railroad lines or because the legislature bethought itself that possibly some smaller liner could not transport passengers at two cents a mile. However, when it came to the making of this exception, the second thought came to the legislature, that branch lines were sometimes "controlled, operated and managed," and in some cases had become "*a part of*," the larger lines, and were used as feeders to these larger lines. And, while the legislature desired to exempt railroads under fifty miles in length, it did not want this exemption to occur if the larger lines could get the advantage of it. It, therefore, put in an exception to the proviso, and thereby made the "control, management or operation" of such railroads the basis of classification for rate purposes. There is nothing to prevent one railroad from leasing another or purchasing a control of, or managing and operating, another. The right to do so is given by the law

and the legislature could not have interfered with such contracts or purchases of this kind as had already been made; and it would do violence to the words of this Act, its spirit and purpose, to put a construction upon it other than what we have given.

No one would contend that there is anything in chapter 41 of the Acts of 1907 which limits in any way the power of one railroad to acquire another by purchase or lease; but the law on this subject remains as it was before that Act was passed. We cannot escape the conclusion that the legislature was dealing with railroads as they were, and with their rights and powers as they existed at the time the Act was passed and as they might thereafter exist under the law. The words used show that the legislature was dealing with every form of "management, operation and control" that was authorized by law; and was also dealing with the merger of one railroad by another, and with those cases in which one railroad could also become "a part of" another railroad by purchase of the physical property.

The history of this legislation in both House and Senate confirms our position.

That the effect of the terms "controlled, managed or operated" as used in the proviso in the first section was well understood by the Legislature, and that there was not only no legislative intent that these terms should mean a merger or should have the effect of creating a situation the same as a consolidation of the lines of the parent and the controlled railroad is shown by the legislative history of this Act.

The House Journal for 1907 shows on Page 132 that Mr. Holle introduced House Bill No. 14, entitled "A Bill to amend and reenact Section 82C of Chapter 54 of the Code of West Virginia." This Bill had no exceptions but "applied to all railroad corporations organized or doing business in this State under the laws or authority thereof."

Section 4 of that Bill was as follows:

> "The term railroad corporation, for the purpose of this act shall be taken to mean all corporations, companies, public carriers or individuals now owning or operating or which may hereafter own or operate any railroad in this State."

A substitute was offered adhering to the classifications A. B. C. and D. found in Section 82C, sub-section 3, Chapter 54 of the Code,

and putting Class A upon a two cent basis; Class B at two and one-half cents; Class C at three and one-half cents; and Class D at four and one-half cents. (See House Journal 1907, Pages 344 and 345).

Another amendment was offered, providing that when one railroad "owns, controls or operates" another railroad "of another corporation," the gross annual earnings per mile of the entire system shall be computed in classifying. This amendment and the substitute were lost (House Journal 346).

In the Senate a Bill was introduced as Senate Bill No. 15. It was entitled "A Bill to amend and re-enact Section 82C of Chapter 54 of the Code of West Virginia, relating to railroad charges.' A substitute for this was prepared by the Railroad Committee of the Senate. (See Senate Journal 379). This Substitute passed the Senate although the question was raised that the constitutional rule was not dispensed with. (See Senate Journal 419). It came back from the House amended by striking out the last proviso in Section 1, (which is the proviso under consideration), and the Senate refused to concur in these amendments. (Senate Journal 517). There was a conference whose deliberations resulted in an agreement, (See Senate Journal 578 and Senate Journal 655). Afterwards, it coming to the knowledge of the Senate that the House desired the questions re-committed to it, the Senate agreed and there was another conference. (Senate Journal 686). This last conference committee made a report. (See Senate Journal 697 and 698. Senate Journal 702). The bill finally adopted was the bill as passed by the Senate. (Senate Journal, Feb. 20, 1907). When the Senate Bill was reported to the House a substitute was there offered adhering to the classifications contained in Section 82C, Chapter 54 of the Code, and fixing as the rate for Classes A and B two cents; for Class C three cents; and for Class D four cents. (See House Journal 503 and 518). The Bill was passed, but the vote by which it was passed was re-considered, (See House Journal 518); and thereupon an amendment was offered by Mr. Mason, providing that the act should not apply to railroads having less than four thousand dollars gross earnings, which latter were limited to four cents per mile, and the following further amendment: "For the purpose of this act the gross earnings as aforesaid of any railroad *owned, leased, operated* or *controlled* by any other railroad shall be fixed as though both railroads were one and the same" This amendment and the substitute were lost. (House Journal 526 and 527). The Bill was then passed, although the point of order

was made that it had not been read on three separate days. (House Journal 528).

When the Bill was first reported back to the House by the conference committee, Mr. Holle, one of the members of that Committee made a minority report, which is as follows:

> "Mr. Speaker and Gentlemen of the House of Delegates:
>
> "One of your conferees on the part of the House desires to make the following minority report to your Honorable Body:
>
> "I can not agree with the majority conferees of the two Houses on the substitute Senate Bill No. 15. I believe it to be arbitrary class legislation. All laws of a general nature shall have uniform operation on all property of a general class, and this will not so operate. It fixes an arbitrary rate or flat two cent rate on all railroads in this state over fifty miles in length, regardless of their earning capacity and fixes a classified rate on the gross earnings per mile for the transportation of passsenger and baggage on railroads less than fifty miles in length, and therefore the operation of law under this Bill would not be uniform and therefore of a very doubtful character." H. J. p. 700.

The Bill as passed by the Senate was finally agreed to, (See House Journal 744-745) and is the law as it is now on the statute books.

The Attorney-General is now construing the law to mean exactly that kind of discriminating legislation to which the minority objected, and which caused the Bill to be re-committed to the conference committee.

It is a pleasure to find sentiments now expressed in the heat of a legal battle supported by the deliberate warnings of a part of the legislative body which passed this Bill.

Let us compare the last clause of sub-section 6 sec. 82C. Chap. 54 Code, with the proviso in the act of 1907 and consider the two in the light of the above legislative proceedings.

Sub-section is as follows:

> "Whenever any railroad corporation as lessee or otherwise, operates any other railroad in connection with

its own road, the provisions of this act as to charges for carrying freight and passengers shall apply to such other road so operated, in like manner as if the same were a part of the line of the road owned by the corporation operating the same; and for such purposes all lines of railroads operated by the same company shall be considered as one and the same road."

As we shall show later on, this Court has held that sub-sections 7 and 8 of section 82C. are repealed by the act of 1895, Ch. 17, (44 W. Va. 580).

The proviso in the act of 1907 is that:

> "Nothing in this act shall apply to any railroad in this State under fifty miles in length and not a part of, or under the *control, management* or *operation* of another railroad, over fifty miles in length, operating wholly or in part in the State."

Aside from the force of the fact that an attempt was unsuccessfully made to put the former law into the act of 1907, it seems hard to believe that any one having the two sections before him can hesitate a moment in deciding that the two cannot stand as legislation at one and the same time. What is the need of the last, as construed by the Attorney General, if the first be the law? Section 6 makes the combined mileage, by lease or operation, the basis of determining, what? Not the *length* which was the basis of the Act of 1907, but the *gross earnings*, which was the basis of the Act of 1872.

But suppose for the argument, that the two shall be considered as law now, what is the situation. Under the former all combined lines, whether by lease or operation, are "one and the same" for the "purpose of this Act," that is the Act of 1872, sec. 82C. Chap. 54. The title of the Act of 1907 is not to *Amend* and *re-enact* the Act of 1872 although both the House and Senate Bills originally were so entitled, (sec. 82C. Ch. 54 being the same thing as the Act of 1872) but is entitled, "A Bill relating to and regulating passenger rates upon railroads in the State of West Virginia, and prescribing penalties for the violation thereof." The new Act is independent legislation on *passenger rates*, embracing that whole subject, whereas the old law embraced also *freight rates*. A railroad under fifty miles in length, say 40 miles long, operating another road, say 30 miles

long, would, under the old law, be 70 miles of railroad, for both would be "one and the same road." If the same situation is to be inferred or deduced now, what meaning or purpose can be given to the proviso in sec. 1 of the Act of 1907. It would be a useless provision, performing no function whatever. The law would be the same with it as without it. As to freight rates, the old law (subsection 6) might be in existence, but as to passenger rates, the language of the new law and its legislative history show a clear purpose to make the latter supersede the former and therefore *combined mileage* by lease or operation does not apply where one railroad *controls*, *manages* or *operates* another.

The legislature is presumed to have knowledge of the subject and of this prior legislation. *State v. Harden*, 62 W. Va. 351.

So far we have proceeded upon a theory most favorable to the contention of the Defendants,to-wit: that the legislature attempted to make a classification of railroads, but failed to make one which can be upheld under the Fourteenth Amendment. We have given the broadest scope under the limitations laid down by federal and state authority to the power of the legislature, and have conceded, without reserve, the authority of *Dow v. Beidelman*, the only case in which a classification of railroads according to length has been upheld. But is this statute entitled to that consideration? Is it not rather an Act regulating certain railroads and exempting all others? If it can be said, by any construction, that this is a statute regulating all railroads fifty miles and over in length, and exempting from such regulation all railroads under fifty miles in length, is not its last state as bad as its first?

The case of *Dow v. Beidelman* had no exceptions to deal with. True some railroads were put in one class and some were put in another, but every railroad in the state was assigned to a class, and each class was limited to a specific rate for the transportation of passengers and the same rate applied to all in each class, under all circumstances. But we contend that the two exceptions, to-wit, the one excepting railroads under fifty miles in length, and the one excepting all electric lines, bring this legislation within another category of class legislation, that has been condemned by the Supreme Court of the United States, and by the decisions in practically all of the states where such legislation has been attempted.

"Those who make the laws are to govern by promulgated, established laws, not to be varied in particular cases,

but to have one rule for rich and poor, for the favorite at Court and the countryman at plow." Cooley Con. Lim. 5th Ed. 484.

An Act of Kansas had an exception that it should apply only to corporations or trusts or their agents, lessees or business managers that employ ten or more persons. In *State v. Haun*, 61 Kansas, 146, that Legislation was held to be "arbitrary and wanting in reason. The Act is class legislation of the most pronounced character."

To the same effect see *Railway Company v. Medaris*, 60 Kansas 155. See also *Levalle v. Railroad*, 40 *Minnesota* 249. In the case of *Deppe v. Railway Company*, 36 Iowa 55 the court says:

> "But if the statute should be so construed as to apply to all persons in the employ of railroad corporations without regard to the business they were employed in, then it would be a clear case of *class legislation*, and would not apply upon the same terms to all in the same situation, and hence would be unconstitutional and manifestly so."

Similar acts of the legislature undertaking to fix corporate liability have been condemned by various states: *Ballard v. Cotton Oil Company*, 81 Mississippi 507, and cases cited.

The case of *Bedford Quarries Company v. Bough*, 80 N. E. 529, (Ind.) reviews the authorities and concludes:

> "In view of this every one must realize that there is a reasonable ground for the essential idea of the employers' liability legislation; but the fact must not be forgotten that the small industry still exists, and that under the convenient form of corporate capacity men still carry on industrial undertakings which are in no essential particular different from those which are carried on by co-partnerships and individuals. It is this fact which makes a classification on the basis of the character of the employer inherently vicious."

From the above decisions there is no escape from the rule that an exception to the statute cannot take one business and favor

it when other corporations and other individuals, doing the same kind of business, are not so favored. And it is equally clear that the state courts have condemned all such legislation which allows a small corporation to engage in the same business with a larger corporation, the latter having burdens which the former has not, or the former having privileges which the latter has not.

> "The question of constitutional law to which we have referred, can not be disposed of by saying that the statute in question may be referred to what are called the *police powers* of the State, which, as often stated by this Court, were not included in the grants of power to the general government, and were therefore reserved to the states when the Constitution was ordained. But as the Constitution of the United States is the supreme law of the land, anything in the Constitution or statutes to the contrary notwithstanding, a statute of a state, even when avowedly enacted in the exercise of its police powers, *must yield to that law.* No right granted or secured by the Constitution of the United States can be impaired or destroyed by a state enactment, *whatever may be the source from which the power to pass such enactment may have been derived.*" (Our italics).
>
> *Connally v. Sewer Pipe Co.*, 184 U. S. 558.

This most effectively disposes of the claim that the power to pass this discriminating legislation may be justified under the Police Power or under the reservation clause giving the State the right to amend charters or any law pertaining to corporations. The case of *State v. Petroleum Co.*, 58 W. Va. 109, does not controvene the above principle laid down by the Supreme Court. Judge Brannon says in the 58th W. Va. case:

> "If the State deprives the corporation of a right its action would not be held good."

He then proceeds to show that no "right" was invaded, because the thing demanded was reasonable, and it was secured by legislation, the power to enact which was, in effect, written into every state charter. But the thing demanded in that case was demanded of *every corporation* and was *reasonable*. So the question

is here, is the regulation reasonable, and does it apply uniformly and justly to all in like situation?

The courts have, in applying the equal protection clause of the Fourteenth Amendment, given relief from every class of legislation which has arisen in an attempt to discriminate. In *Connoly v. Union Sewer Pipe Company*, 184 U. S. 540, the legislature of Illinois passed an anti-trust act, but at the end inserted the following clause:

> "The provisions of this Act shall not apply to agricultural products or live stock while in the hands of the producer or raiser."

The Supreme Court held that while it was in the power of the legislature to pass the anti-trust act, it was not in the power of the legislature to permit discriminations which gave to one person or one set of persons or corporations, rights or immunities not enjoyed by other persons or corporations in like situation. In the language of the Court:

> "A state may in its wisdom, classify property for purposes of taxation, and the exercise of its discretion is not to be questioned in a Court of the United States, so long as the classification does not invade rights secured by the Constitution of the United States. But different considerations control when the state, by legislation, seeks to regulate the enjoyment of rights, and the pursuit of qualities connected with domestic trade. In prescribing regulations for the conduct of trade it cannot divide those engaged in trade into classes and make criminals of one class if they do certain forbidden things, while allowing another and favored class engaged in the same domestic trade to do the same things with impunity. Such a statute is not a legitimate exertion of the power of classification, rests upon no reasonable basis, is purely arbitrary, and plainly denies the equal protection of the law to those against whom it discriminates." To the same effect, in re Grice 79 Fed. Rep. 628.

In the case of *Cotting v. Kansas City Stock Yards Co.*, 183 U. S. 85, an attempted classification was made, but the effect of it was to except everyone engaged in the same business from its

operation, but one corporation. We have quoted this part of the Court's decision at another place, and refer to it here for the reason that, like the statute in that case so the statute here applies to but ten railroads and excepts forty-five.

The Act regulating railroads which is repealed by the Act in question is section 82C of chapter 54 of the Code. (Chap. 227 Acts 1872-3). That Act regulated all railroads having any mileage worth considering, assigning every railroad to a class. With that form of an Act before it, it seems strange that such a one-sided piece of legislation could have been passed by the legislature as the one now under consideration. It only proves that this last legislation was rushed through without that kind of deliberation and care, and without the necessary investigation which important legislation of this kind deserves. Forty-five railroads in West Virginia are left without any sort of regulation. Some of them go into territories where they have monopolies of the entire business; and yet their charges are not limited, and, indeed, an Act which did limit charges has been repealed. They may now charge whatever financial necessity may demand. Some of them are competitors with lines over fifty miles in length at least along part of the lines of the latter. If public needs could have weight in argument in this place it could be well urged that it would be better to have no legislation till the next legislature should meet than to leave forty-five railroads with absolutely no regulation. If we are to have regulation of railroads in West Virginia as to their rates of passenger charges, then we should have a law that deals with all of them fairly and upon a basis of classification that makes distinctions with a difference, and upon grounds that have due regard to the just rights of the people upon the one hand, and the constitutional rights of the railroads and the subject of over-charging upon the other hand. It cannot be contended that the points made against this statute, if good, cannot be raised by anyone coming within the purview of the legislation and against whom the Act is sought to be enforced.

In the Illinois case 184 U. S. supra, it was sought to enforce the act against one who did not come within the exception and because of the exception the Court held the entire act invalid. The Act of 1907 is so drawn that it is all good, or it is all bad.

But there is another exception to the Act in question which brings it within the condemnation of the authorities quoted, that is, the clause excepting all *electric* lines. We concede that there may be a reason for excepting street railroads because these cannot oper-

ate in streets except by permission of the municipal authorities of the cities and towns in which they are located, and the permit for such operation usually takes the form of a charter which is in the nature of a contract, and rates are usually prescribed by the charters. Another reason why these street car lines might be excepted would be, that their business is peculiarly local. Very properly they should be left under local authority for regulation. But not so with electric lines. Law must follow development and progress. Electric power has developed rapidly. In Indiana, Illinois, Ohio, Iowa, Michigan, Pennsylvania, New York and New Jersey, as well as in West Virginia, the electric line is not now confined to cities and towns and their suburbs, but they run local and express trains, and, in some states, operate sleepers from city to town. The fact is that in some places steam railroads are gradually changing their motive power to electricity. In the eighties when the case of *Dow v. Beidelman* was decided electric power bore about the same relation to transportation that air ships do now and these lines were not considered. But now there are thousands of miles of railroad, formerly steam railroad, which are operated by electric power; and the time is near at hand when there will be a greater supplanting of steam power by it.

If the Chesapeake & Ohio Railway Company should change its motive power from steam to electricity, why should that exempt it from the operation of the two cent act? What has motive power to do with the classification of railroads for the purpose of fixing passenger rates? We think that this exemption is not founded upon any "just reason," but is an "arbitrary selection," and is upon a ground that "has no just relation to the subject" of high rates. It cannot be said that street car service was in the mind of the legislature because that is specifically mentioned and connected "with electric lines" by the conjunction "and." There are electric lines in this state now operating in competition with steam lines running from one city to another, some of them longer than some steam railroads, one over forty-three miles in length. The time, of course will soon come when these electric lines will be over fifty miles in length. What reason or justification can be given for saying that a steam railroad running from Charleston to Huntington can charge only two cents a mile, but an electric line running from Charleston to Huntington shall not be held to two cents a mile? It is the same passenger service, it is the same distance. Both are operated for the public convenience, the only difference being that the electric line can be operated more cheaply, costs less

money to build, less to equip, less to operate. There is reason why the latter should be required to charge less. But why should one be held to a rate and the other not?

Notwithstanding the views here expressed, the Supreme Court of West Virginia, in its decision in the Coal & Coke Railway Company case, held that the two cent rate act did not wholly repeal former legislation relating to the subject, either by implication or express provision; but it impliedly amended Chapter 227 of the Acts of 1873, as amended by Chapter 42 of the Acts of 1885. In other words, sub-Section V of Section 82-C would be repealed only in part. That section prescribed a penalty upon any railroad which shall demand, charge or receive any greater compensation for the transportation of any passenger than is authorized by that act. If a railroad company, fifty miles in length, should charge more than the lawful rate, are there two penalties? The one, under the old law, of five hundred dollars "to the party aggrieved," and another, under the new law, of a fine to the State of from fifty to five hundred dollars? If so, there are greater and heavier penalties on the small railroad than on the larger. If not, and the new law fixes the penalty for the railroad over fifty miles long, and the old law fixes the penalty for the railroad under fifty miles long, then one must answer a criminal statute with a varying penalty from fifty to five hundred dollars, and the other must answer a civil action for a flat penalty of five hundred dollars and a "reasonable attorney's fee." Can one imagine a greater injustice or wrong than to regulate a line forty-five miles in length, earning $10,000.00 a mile by the old law on a 3 cent rate, while at the same time regulating a line fifty-five miles in length under the two cent rate act, when the latter may not earn half that amount? No state has ever attempted to classify some railroads by length and others by gross earnings, and no court has ever upheld any such classification. The Court was driven to this construction in order to uphold the new law.

In looking at the finding of the Supreme Court of West Virginia sustaining the validity of the statute, this Court will see that the Court, in order to uphold the act as valid, was driven to the necessity of holding that the two cent rate act repealed in part the existing railroad rate law in West Virginia, and in order to escape the conclusion that the penalties pronounced rendered the statute unconstitutional, were compelled to read into it an exception that the same should not take effect pending litigation to establish the law's validity. It will further be observed that only three of the

Judges of the West Virginia Court concurred in the majority's opinion. Judge Williams dissented, holding that under

> Cotting vs. Kansas City Stockyards, 183 U. S. 79,
> Connolly vs. Union Sewer Pipe Co., 184 U. S. 540,
> State vs. Goodwill, 33 W. Va., 179,
> State vs. Fire Creek Coal & Coke Co., 33 W. Va. 188,

the statute was invalid. Judge Brannon concurred in holding the act unconstitutional, as being confiscatory as against the Coal & Coke Railway Company, but could not concur in all of the opinion.

Judge Brannon says:

> "Upon the question whether the act is violative of the Fourteenth Amendment, this Court must follow the National Supreme Court. That Court has settled it that where penalties for violation of a rate act are so severe that they intimidate the railroad company from appealing to the courts for relief, from fear of ruin, from multiplied penalties pending litigation to test the act, it deprives the company of property without due process of law, and denies the equal protection of the law by shutting them out from the courts."

> Ex parte Young, 209 U. S. 123;
> Wilcox vs. Consol. Gas. Co., 212 Id. 19.

He then refers to the fact that the penalty pronounced against the railroad would make of the railroad a "colossal wreck," and that "this shows the penalty section void under the Fourteenth Amendment."

Continuing, he says:

> "I regard the statute on its face void as to the penalty section. We take judicial notice that thousands of penalties will be incurred in a few weeks. But this penalty section 2 is distinct from section 1; and I would hold section 1 fixing two cents per mile as valid as far as its face is concerned, and section two void. True, that leaves the act without penalty; but the company would be liable to

repay overcharges, thus leaving a means of enforcing, as in many other cases, by action."

Continuing, Judge Brannon says:

> "Being of the opinion that the penalty section is void, and this suit being an injunction to prevent prosecution under it only, I would sustain the injunction."

In this connection, it will be noted that the suit at bar is a suit brought to test not only the validity of the statute as to the rates on the ground that it is unconstitutional, and as being a class distinction, but also to prevent the enforcement of the penalty clause as being excessive and unconstitutional.

Applying the principle enunciated by the decision of the two dissenting judges, in passing upon the validity of the statute in question, we earnestly contend that the injunction awarded in the case at bar by the Circuit Court of Kanawha County, in the original decision, was and is valid, and that the whole statute must be taken together; that while the penal part is absolutely void, the class distinction is equally so. It does not require any close investigation of the situation to see that the Legislature, in enacting the statute, attempted directly to affect the trunk lines operating as interstate carriers through the State without naming same directly, and, although they are not named, they are as clearly designated as was the Kansas City Stockyards in the Cotting case. The statute operates as directly to prohibit The Chesapeake & Ohio Railway Company, The Baltimore & Ohio Railroad Company, Norfolk & Western Railway Company, Virginian Railway Company, and the Pennsylvania Railroad Company, from charging more than two cents on the lines owned, operated, and controlled by them in the State of West Virginia, as if they had been directly named in the act. Being assured that an act naming these five roads would be on its face class legislation, the Legislature sought to do away by indirection what they could not directly do, and the records of the Legislature during the time these matters were before them, as hereinbefore referred to, bear out this contention.

Again, it is evident that by imposing such exaggerated penalties for violaion of the act, the Legislature sought to absolutely prevent any recourse to the courts by any of the companies affected. If a company sold a ticket for a greater rate than two cents per mile, it was immediately liable to a penalty not at all commensurate or

in any manner in proportion to the amount received for such transportation, and the defendants were threatened with prosecution in case of such violation. No question of injury sustained by the purchaser, or of the civil right to recover, enters into the question, as to this plaintiff, but the penalty of from $50,00 to $500.00 can be at once imposed for such a sale. It thus became absolutely necessary for the Company, it it desired to protect its interests, to take some steps to prevent the enforcement of the act. The injunction proceeding was the result. The courts were compelled to admit the justice of the claims of the plaintiff that the amount of the fine would prohibit litigation, and the West Virginia Supreme Court thereupon, instead of holding the law invalid, proceeded to read into it an exemption permitting the corporations challenging the validity of the statute to be excused from the penalty pending litigation. We contend that the provision for such fines is so necessarily a part of the act itself that when taken in connection with the classification attempted to be enforced, the whole statute is void, under the provisions of the Eighth Article of the Constitution, taken in connection with Section One of the Fourteenth Amendment.

We now desire to refer briefly to the cases decided by this Court touching upon the right to classify, and upon the constitutional provisions on which we rely in support of our contention.

I.

EXCESSIVE FINES AND PENALTIES IMPOSED.

"A state railroad statute which imposes such excessive penalties that the parties affected are deterred from testing its validity in the courts, denies the carrier the equal protection of the law, without regard to the question of insufficiency of the rates prescribed."

Ex parte Young, 209 U. S., 123.
Wilcox vs. Consol. Gas Co. 212 U. S. 19.

II.

CLASSIFICATION.

"While the length of the road may furnish in some instances a proper basis for classification, such classifica-

tion must be called for by facts justifying it, and if it has the effect of denying equal protection to parties engaged in the same kind of business, and is so worded that it applies to some corporations in the class, and excludes others, it is invalid."

Kentucky R. R. Tax Cases, 115 U. S. 321.
Cotting vs. Kansas City Stockyards, 183 U. S. 79.

In *St. Louis Consolidated Coal Company vs. Illinois*, 185 *U. S.* 203, the Court says:

"This is a species of classification which the legislature is at liberty to adopt, provided it be not wholly arbitrary or unreasonable, as it was in Cotting vs. Kansas City Stock Yards Company, 183 U. S. 79."

And in *Connolly vs. Union Sewer Pipe Co.*, 184 *U. S.* 540, the statute did not apply to agricultural products or live stock while in the hands of the producer or raiser. It was held that this exemption rendered the statute void, as denying to persons within the jurisdiction of the state the equal protection of the laws. The statute was held to create a classification of an arbitrary nature, applicable to a large number of people, and yet not based upon any reasonable ground. Those who were exempted from its provisions were numerous and stood practically in the same relation to the subject matter of the statute as did the other class upon whom the statute acted, and no valid reason could be given why, if one were included, the other should be exempted. The same reasons applied to all the classes, and should have led to the same results with regard to all. There was no room for proper or fair discrimination.

This question of classification has been before this Court in a number of cases in which the classification has been upheld or the Cotting case distinguished. A review of all the cases that have come to our attention, decided by this Co rt, will, however, we believe, sustain our contention that the Cotting case applies to the statute in question, and in those cases where a classification was upheld there is a clear distinction between the statutes considered and the one now before the Court.

In *Louisville & Nashville R. R. Company vs. Melton*, 218 *U. S.* 36, the equal protection provision of the Fourteenth Amendment was held not to deprive the States of the power to classify, but only

of the abuse of such power; nor was the clause offended against because some inequality might be occasioned by a classification in legislation properly enacted under the police power.

In that case the Court held the Employers' Liability Statute of Indiana constitutional. It will be noticed that the provision of the Indiana law was that every railroad should be liable for damages for personal injury to its employes.

It appears to us that while this Court held the Indiana statute constitutional, it would not so have held if, in addition to the provision that all railroads should be liable for damages, there had been added a provision making such statute applicable to roads of a certain length, and had added to that a provision that roads excepted on account of the length, if owned, controlled or managed by roads not excepted, should be included. In other words, if the Indiana statute had excepted railroads under fifty miles, unless such roads were operated by a railroad over fifty miles, it seems clear that the Court would have held it was unconstitutional because of the discrimination, there being no reason why any rule should be applied to employes of one road and other employes excepted. Is there any more reason to justify the statute under consideration in its application where the ownership determines the question as to whether or not the road is subject to the provisions of the statute? It seems to us that the mere statement of the proposition is sufficient answer, and that the thing speaks for itself.

*Missouri, Kansas & Texas Railway Company vs. May*, 194 *U. S.* 267.

In this case the law of Texas, Chapter 117, 1901, was directed solely against the railway companies and imposed a penalty for permitting Johnson grass and Russian thistle to go to seed upon their rights of way, and the court held it was not shown so clearly to deny the companies equal protection of the laws as to be held contrary to the Fourteenth Amendment.

It will be noted, in this connection, that there were three dissenting opinions in this case. Mr. Justice Brown, in dissenting in this case, says:

> "If Johnson grass growing upon railway tracks be a nuisance, it is equally so when growing upon the other side of the line fence, and I think the law should be made general to avoid the charge of an arbitrary discrimination. If the land owned by every corporation were held to this

liability, while the land of individuals were exempt, the discrimination would be more conspicuously unjust in its appearance, but scarcely more so in its reality."

We respectfully submit that if the Texas acts had obtained a provision making the statute applicable only to roads over fifty miles in length and to those under fifty miles owned, controlled or operated by roads over fifty miles, and exempting roads when not so owned and operated under fifty miles, the opinion of the court would have been changed and the act would have been construed in accordance with the opinion of the dissenting Justices.

*Ozan Lumber Company* vs. *Union County National Bank & Liberty*, 207 *U. S.* 251.

In this case the statute of Arkansas providing that all notes given for payment of patented articles must show that they were so given, and permitting defenses to be made to such notes in the hands of third parties, was held to create and enforce a police regulation, aimed principally at itinerant vendors of patented articles, and the distinction in paragraph 4 that it shall not apply to merchants and dealers who sell patented articles in the usual course of business was founded upon fair reasoning and is not such a discrimination as violated the equal protection provisions of the Fourteenth Amendment, and the court in its opinion delivered by Justice Peckham distinguishes that case from Conley against the Union Sewer Pipe Company, 184 U. S. 540, and stated that in the Arkansas case, the court thought there was a distinction founded upon fair reasoning which upheld the principle of exemption as contained in the fourth section, and that consequently, the statute did not violate the Fourteenth Amendment, but we respectfully submit that there could have been no distinction drawn between the Arkansas case and the case of Connoly against the Sewer Pipe Company, if the Arkansas case had made the question of exemption depend upon the ownership of the stores of Companies in which the merchants and dealers sold the patented articles in the usual course of business.

*McLean* vs. *State of Arkansas*, 211 *U. S.* 539.

The Arkansas Statute making it unlawful for any mine owner, where ten or more men are employed to pass the output of coal from the mine over any screen which would take any part from the value thereof before same had been weighed was up for consid-

eration, and the court in its opinion two of the Justices dissenting, says "We cannot say that there was no reason for exempting from its provisions mines so small as to be in the experimental or formative state and affecting but few men, and not requiring regulation in the interest of the public health, safety or welfare." Granting that this classification is proper, it was not made to depend upon the ownership, but simply upon the fact that the mines were so small to be either formative or in the experimental stage. The exception was not made to depend either upon ownership or operation.

In *Dow vs. Beidelman*, 125 *U. S.* 680, which is the leading case relied upon by the defendant, the statute contains no such provision as the West Virginia statute, limiting the length by ownership or operation. In that case a statute of a state classifying its railroad corporations by the length of their lines, and fixing a different limit of the rate of passenger fare in each class, was held not to deny to any corporation the equal protection of the law, within the Fourteenth Amendment to the Constitution of the United States, the Court saying:

> "If the same rule is applied to all railroads of the same class, there is no violation of the constitutional provision securing to all the equal protection of the law."

*New York, New Haven & Hartford Railroad Company vs. New York*, 165 *U. S.* 628, is a case holding that the statute subjecting railroads over fifty miles in length to certain regulations, as to heating of cars and directing guards and guard posts to be placed on railroad bridges, but exempting railroads of less than fifty miles in length is not repugnant to the Fourteenth Amendment, forbidding a state from denying to any person within its jurisdiction the equal protection of the law.

The exemption of railroads under fifty miles in length in this case was evidently based upon the fact that a road only fifty miles in length would seldom have sleeping cars attached to its trains and passengers traveling on roads of that kind did not have the apprehension of those on trains carrying sleeping cars, or having many passenger coaches, on account of the burning of cars in case of their derailment or in case of collision, the Court saying:

> "In any event, there is no such discrimination against companies having more than fifty miles of road as to justify

the contention that there has been a denial to the companies named in the act of the equal protection of the laws. *The statute is uniform in its operation upon all railroad companies doing business in the State of the class to which it is made applicable.*"

*Chicago, Rock Island and Pacific Railway Company v. State of Arkansas*, 219, *U. S.* 453, decided February, 1911, says "A State regulation that is uniform on all railroads of the class to which it is applicable is not unconstitutional as denying equal protection of the law because it does not apply to railroads less than fifty miles in length. The classification is a reasonable one."

This is where we make the distinction between the case at bar and the Arkansas case. The purpose of the statute in the Arkansas case was to require a full crew on all railroads over fifty miles in length, the statute providing: "This act shall not apply to any railroad company or officer of court whose line or lines are less than fifty miles in length, nor to any railroad in this State, regardless of the length of the said lines, where freight trains so operated shall consist of less than twenty-five cars,it being the purpose of this act to require all railroads in this state whose line or lines are over fifty miles in length engaged in hauling freight trains consisting of twenty-five cars or more, to equip the same with a crew consisting of not less than an engineer, a fireman, a conductor, and three brakemen." The Court says on page 466: "It is a means employed by the State to accomplish an object which it is entitled to accomplish, and such means, even if deemed unwise, are not to be condemned or disregarded by the courts, if they have a real relation to that object. And the statute being applicable alike to all beloging to the same class, there is no basis for the contention that there has been a denial of the equal protection of the laws."

*In Heath & Milligan Manufacturing Company v. Worst*, 207 *U.S.* 338, the court approving Ozan Lumber Company against Union County Bank, 207, U. S. 251. The court held constitutional the statute of North Dakota, requiring the Manufacturers and Vendors of mixed paints to label the ingredients composing them. Here again it will be observed that there is no exception made as to whether the Manufacturer of such mixed paints subject to the statute was controlled by a small company or a large company. It applied equally to all persons manufacturing paints of the character requiring the labor and the mere fact that paste paints were exempted was held insufficient to invalidate the statute.

In West Virginia there are a number of railroads to whom the rate statute is applicable and a larger number to whom it does not apply. The greater number may or may not be regulated under the old statute, chapter 227, Acts of 1872-3, and it is immaterial whether the old act was repealed by the act of 1907 or not. This question, we have heretofore referred to, (see page 36 of this brief). In the case of State against Peel Steel Splint Coal Company, 36 W. Va., page 802, the statute regulating coal mines was, by a divided court, upheld, but there was no question in that case as to the different classifications of coal mines or corporations excepting anybody. It prohibited corporations, companies, firms or persons issuing script in payment of lawful indebtedness, other than lawful money to laborers, and that statute was held constitutional, only by a divided court.

In *Engel vs. O'Malley*, 219 *U. S.* 128, the court followed Heath & Milligan Manufacturing Company vs. Worst, 207 U. S. 338.

The case arose under the laws of New York for 1910, which forbid individuals or partnerships to engage in the business of receiving deposits of money for safe keeping or for the purpose of transmission to another or for any other purpose without a license from the Comptroller, and also provided that the provision would not apply to any corporation or individual banker authorized to do business under the banking law, or to national banks; to any hotel keeper who shall receive money for safe keeping from a guest, to any express or telegraph company, or to individuals or partnerships where the average amount of each sum received on deposit for transmission in the ordinary course of business shall have been not less than five hundred dollars, etc., and the Court says:

> "It is true, no doubt, that where size is not an index to an admitted evil, the law cannot discriminate between the great and small. But in this case size is an index. Where the average amount of each sum received is not less than five hundred dollars, we know that we have not before us the class of ignorant and helpless depositors, largely foreign, whom the law seeks to protect."

This is the only act, to our knowledge, passed upon by this Court where the question of size or volume of business is touched upon, and in that case, the reason of the Court, from the evident purposes of the statute, is clearly right, but would the principle of

size apply to the two cent rate case? In the case at bar there is no reason that can be adduced from the purposes of the statute to support. It must be the inevitable conclusion of this Court that the act, as passed by the West Virginia Legislature, was directed simply against the main trunk lines operating in West Virginia, and was an attempt to reduce the passenger rates then in force over such lines and was not intended to benefit the public, but to punish the Railway Company.

All of the foregoing cases cited by us, in our opinion, but emphasize the difference between the Cotting case and those cases upholding the classification. In the Cotting case the prohibition applied to one company only, and exempted all the others. In West Virginia the prohibition applies to certain lines of railroad and exempts all the others. To all intent and purposes, it is the same as though the statute had named the roads who were limited to a charge of two cents and no limit imposed upon the remaining roads. This is such a limitation upon the classification as brings the act clearly within the prohibition of the first clause of the Fourteenth Amendment.

## THE ACT OF THE LEGISLATURE OF WEST VIRGINIA COMPLAINED OF, CHAPTER 41, 1907, IMPOSES BURDENS AND RESTRICTIONS UPON INTERSTATE COMMERCE, AND IS FOR THAT REASON ALSO INVALID.

This point was raised upon the hearing of the case in the Kanawha Circuit Court, and overruled. It was then assigned as one of the errors in the petition for appeal to the Supreme Court of Appeals. The Supreme Court holding the decision of the lower court plainly right, overruled this contention of the plaintiff in error here, and, as shown by the order entered by the West Virginia Court of Appeals and by the assignment of error set out on page forty-seven of the printed record, that point is now relied upon as one of the grounds invalidating the statute. The eleventh section of the plaintiff's bill sets out the effect of the act upon its interstate traffic and shows from the station receipts at the State line how the statute of West Virginia enables passengers over the road to avoid the payment of legal interstate rates approved by the Interstate Commerce Commission and the extent to which the practice is carried. While the answer of the defendant denies the conclusions

drawn from statement of the facts, it does not deny the facts as shown in paragraph eleven.

Admitting, as laid down in the case of *Chicago, Rock Island & Pacific Ry. Co. vs. Arkansas*, 219 *U. S.* 453, that, while Congress may in its discretion take under its charge the subject of equipment of interstate trains, until it does so the states may prescribe proper police regulations in regard thereto without violating the commerce clause of the Federal Constitution, still, when Congress has, under authority of the Constitution, prescribed rates and regulations governing the charges of interstate carriers, we deny that any state can impose burdens upon or enact statutes that actually do conflict with and nullify the regulations of the Interstate Commerce Commission.

*Hall vs. Decuir*, 95 *U. S.* 489, and *Gulf, Colorado & Santa Fe Ry. Co. vs. Hefley*, 158 *U. S.*, 99.

This latter case holds that

> "When a state statute and a Federal statute operate upon the same subject matter, and prescribe different rules concerning it, and the Federal statute is one within the competency of Congress to enact, the state statute must give way."

It will be noted that the Texas statute passed upon in this case made it unlawful for any railroad company to charge and collect from the owner of any goods a greater sum for transporting the same than was specified in the bill of lading. That statute did not, and the statute of West Virginia does not, except interstate shipments or interstate traffic, and was held void.

See also Wabash, etc. Ry. vs. Illinois, 118 U. S. 557, and Cleveland etc. Ry. vs. Illinois, 177 U. S. 514.

Will it be for a moment contended, that when a rate has been established by the carrier and approved by the Interstate Commerce Commission according to law, that the Railway Company could, by putting in a series of State rates, evade the established interstate rate? If the Railway Company, subject to the Interstate Commerce rulings and the direction of the Interstate Commerce Commission, should put in force the same rate that is permitted by the statute in the State of West Virginia, it would at once be subject to the penalties for discrimination. The statute of West Virginia, however, enables all parties desiring to do so to evade the interstate law, and the plaintiff here is absolutely unable

to prevent it. The Attorney General, in his answer, attempts to evade the effect of the plaintiff's statement by calling attention to the fact that the average rate charged by the railroad per passenger per mile is less than two cents, but does not deny the fact that the interstate rate through the States of West Virginia and Virginia to Washington, D. C. is greater than the West Virginia State rate plus the Virginia rate and we respectfully submit that whether the average rate per passenger per mile over the whole system operated by the Chesapeake & Ohio Railway Company is greater or less than two cents, nevertheless, the statute changing the rate from three cents in West Virginia to two cents, does affect the interstate rate as shown in the plaintiff's bill, (pages 14-15 and 16 of the printed record). All of the cases where States are permitted to impose any burdens or obligations upon interstate commerce, are only those where Congress has not acted. In no place is a State permitted by its statute, to alter burdens or change a rate established under the Interstate Commerce law.

In passing upon the validity of the Employers Liability Act, 207 U.S.463,this court voiced the distinction that we believe justifies us in claiming that the statute in question is clearly within the prohibition of the Constitution as to interstate commerce. There the court says:

> "An act addressed to all common carriers engaged in interstate commerce, and imposing a liability upon them in favor of any of their employes, without qualification or restriction as to the nature of the business at the time of the injury, of necessity includes subjects wholly outside of the power of Congress under the commerce clause of the Constitution."

Is not the converse of this proposition equally true in reference to the statute of West Virginia? Does not the West Virginia statute of necessity include subjects wholly outside of the power of the West Virginia Legislature? While it may be alleged that the act can only apply to state traffic, it does not so specify and does not limit the use of the state rate to state traffic or prohibit its use in interstate journeys, or prevent its use on interstate trains. It is handled by employes of the company subject to interstate rules on interstate trains, and there is no limitation to the carriage of passengers by trains operating wholly within the state. On the contrary, the five roads operating throngh the state and in the state and engaged in interstate commerce,are practically the only roads that are

affected by the act in question. Expressed as it is, the lawmakers knew what they were doing, knew that the legislation was class legislation affecting and intending to affect interstate roads only. There is no exception in the statute permitting The Chesapeake & Ohio Railway Company to refuse to accept fare based upon the two cent rate, although it knows that such rate is being used as a part of an interstate journey. We respectfully submit, that if this statute is valid, that then a carrier desiring to evade the Interstate Commerce regulations of transportation could, by a series of state passes, for interstate traffic, successfully evade the provisions of the interstate law.

A passenger who desires to comply with the law in West Virginia buys a ticket from Huntington to Washington, D. C., paying $10.90 therefor. His fellow passenger buys a ticket to Tuckahoe, one hundred and ninety-six miles, the last station on the eastern boundary of West Virginia, for $3.90. Arriving at Tuckahoe, he either purchases a ticket or pays cash fare to Washington, $6.00. He is carried upon the same train, the same car, at the same time that the interstate passenger is carried, and there is a discrimination in his favor of $1.00. This is not a suppositious case. The sale of tickets, as shown in the bill, to and from Tuckahoe stat ion,the eastern boundary of the State of West Virginia, in 1906, under the three cent rate, was five hundred and fifty-eight, while, without any increase in size or business of the station other than the passenger receipts, there was sold in 1908 four thousand three hundred and ninety-six tickets. The same condition is shown to apply to the stations upon the western limit of the State. At Kenova, near the State line, the number of passengers increased from five thousand eight hundred and twenty-four in 1906 to ten thousand nine hundred and ninety-two in 1908.

This is not a factitious objection—it is a real one, and shows the extent to which the practice is carried. If the law is held valid the practice must either continue or the rate established under the interstate law must be made to meet it. In either view of the case the law does impose a burden upon, and of necessity regulates, interstate traffic, and we submit that the regulation and burden imposed by this statute is much greater than those requiring interstate trains (Cleveland etc. Ry. Co. vs. Illinois,177 U. S. 514,) to make specified stops, which statute, where traffic is cared for by other trains, has been by this Court held as imposing a burden upon interstate traffic.

In conclusion, we rely confidently upon these facts:

First: That the statute, by reason of the extreme penalties pronounced, is in violation of the Constitution of West Virginia.

Second: It makes a distinction that should not be upheld; and that no case passed upon by this Court has ever sustained such an arbitrary statute as the one in question.

Third: That it is a clear effort on the part of the Legislature of West Virginia to make the statute applicable to the trunk lines engaged in interstate commerce, and thereby affect and control the rates published and approved under the regulation of the Interstate Commerce Commission.

We believe we are entitled to a decision holding the statute unconstitutional, and that the judgment of the West Virginia Court should be reversed.

Respectfully Submitted,

H. T. WICKHAM,
W. E. CHILTON,
F. B. ENSLOW,
H. FITZPATRICK,
*Of Counsel for C. & O. Ry. Co.*

No. 657.

IN THE

# SUPREME COURT OF THE UNITED STATES

## OCTOBER TERM 1910

THE CHESAPEAKE & OHIO RAILWAY COMPANY, *Plaintiff in Error.*

v. [Equity.

WM. G. CONLEY, ATTORNEY GENERAL OF THE STATE OF WEST VIRGINIA, ET AL, *Defendants in Error.*

### MOTION TO DISMISS OR TO AFFIRM.

Comes now the defendants in error, by their counsel appearing in their behalf, and move the Court to dismiss the writ of error in the above styled cause for want of jurisdiction, because the judgment or decree from which the said writ of error purports to have been taken is the judgment or decree of a Supreme Court of Appeals of one of the United States, to-wit: The Supreme Court of Appeals of the State of West Virginia.

And the said defendant in error, by counsel as aforesaid, move the court to affirm the said judgment or decree from which said writ of error purports to have been taken, because, although the record in the said cause may show that said Court has jurisdiction in the premises, yet it is manifest that there is no reversible error in the judgment or decree of the Court below, and that said writ of error was taken for delay only.

WILLIAM G. CONLEY,

*Attorney General of the State of West Virginia.*

NEWS-MAIL COMPANY
CHARLESTON, W. Va.

No. 657.

IN THE

# SUPREME COURT OF THE UNITED STATES

## OCTOBER TERM 1910.

THE CHESAPEAKE & OHIO RAILWAY COMPANY, *Plaintiff in Error.*

v. [Equity.

WM. G. CONLEY, ATTORNEY GENERAL OF THE STATE OF WEST VIRGINIA, ET AL., *Defendants in Error.*

### NOTICE.

*To the Chesapeake & Ohio Railway Company, a corporation, and Simms, Enslow, Fitzpatrick & Baker, H. T. Wickham, and Chilton, MacCorkle & Chilton, counsel for plaintiff in error:*

Please take notice that on Monday, the 12th day of December, A. D. 1910, at the opening of the Supreme Court of the United States, or as soon thereafter as counsel can be heard, the motions of which the foregoing are printed copies, will be submitted to said Court for a decision thereon. Annexed hereto is a copy of the brief of argument to be submitted with said motions in support thereof.

Given under my hand this 15th day of November A. D., 1910.

WILLIAM G. CONLEY,

*Attorney General for the State of West Virginia and Counsel for the Defendants in Error for the Purpose of these Motions.*

### ARGUMENT AND CITATION OF AUTHORITIES.

Counsel for the defendants in error contend that the writ of error granted to this Court by the Supreme Court of Appeals of the State of West Virginia, in the foregoing styled cause, should be dismissed, because plaintiff in error fails to sufficiently specify in its petition the alleged grounds of error committed by the court

below. In its citation of error, the plaintiff in error does not show wherein chapter 41 of the Acts of the Legislature of the State of West Virginia of 1907 is invalid and unconstitutional.

The writ of error should also be dismissed, because the plaintiff in error fails to show by proof, or otherwise, wherein the Act complained of, commonly known as the "Two Cent Passenger Act," operates adversely against it. All the material allegations of the bill are denied by the answer, and no proof was taken to sustain the contentions of the plaintiff. The plaintiff in error did not comply with the rulings of the Supreme Court of Appeals of West Virginia as laid down in the Coal & Coke case. It does not make "*a strong and complete prima facie case.*" It does not accompany its bill by exhibits or "*statements, showing in detail the gross income, expenses and net earnings, sworn to and sustaining the allegations of the bill proper.*"

*Coal & Coke Ry. C. v. Conley & Avis*, 67 S. E. Rep. 613, syl. 44-47.

The plaintiff did not make out its case under these rulings. It was therefore proper that the trial court should dismiss the bill, and that the Supreme Court of Appeals of West Virginia should refuse the appeal to its Court, notwithstanding the trial court indicated in its decree that it passed on constitutional questions. A decision on constitutional and federal questions was not necessary to the determination of this cause on the state of the pleadings at the time the decree complained of was entered. The plaintiff in error, therefore, cannot raise, in this Court, such federal questions. The record in this cause does not show on what grounds the Supreme Court of Appeals of West Virginia refused the appeal to that Court. It does not indicate that it was necessary or that it passed on any federal questions. Therefore, the decree complained of is not open to review in the Supreme Court of the United States.

*Chapman* v. *Goodnow*, 123 U. S. 540 (31 L. Ed. 235.)
*Detroit City Ry. Co.* v. *Guthard*, 114 U. S. 133 (29 L. Ed. 118.)
*De Saussure* v. *Gillard*, 127 U. S. 216 (32 L. Ed. 125.)

I do not deem it necessary to discuss, for the purpose of these motions, the other questions of pleadings raised in the State courts, as they cannot be considered here, if I correctly understand the law. The decision of the State court is final on that question. Neither has this Court the authority on writ of error from a state court, to declare a state law in violation of a state constitution.

The ruling of the state court is final on that question, and therefore will not be argued in this brief.

> *Jackson exdem. Hart* v. *Lamphire*, 28 U. S., 280 (7 L. Ed. 679.)
>
> *Osbourne* v. *State of Florida*, 164 U. S. 650, (41 L. Ed. 477);
>
> *Hodge et al.* v. *Muscatine County*, 196 U. S. 276 (49 L. Ed. 477, Syl. 5.)
>
> "The conclusion of a state court that a tax is uniform, within the meaning of the requirement of the state Constitution, when it is equal upon all persons belonging to the described class on which it is imposed is not open to review upon writ of error from the Supreme Court of the United States to the state court."
>
> *Armour Packing Co.* v. *Lacy*, 200 U. S. 226 (50 L. Ed. 451, Syl. 5).

## If Writ of Error is not Dismissed, Court Should Affirm the Judgment or Decree of the State Court.

If this Court be of the opinion that the writ of error ought not be dismissed, then we contend that the judgment or decree of the State court should be affirmed, for the reason that there was no reversible error committed by the court below; and for the further reason that the writ of error was taken for delay only.

There can be no question, in our opinion, and we take it counsel for plaintiff in error will admit it, that the Legislature of West Virginia had full power to establish maximum passenger and freight rates on all interstate passenger and freight traffic, so long as such maximum rates do not operate as a confiscation of the plaintiff's property.

The present Constitution of West Virginia, adoptetd in 1872, in part provides:

> "Railroads heretofore constructed, or that may hereafter be constructed in this State, are hereby declared public highways and shall be free to all persons for the transportation of their persons and property thereon, under such regulations as shall be prescribed by law; and the Legislature shall, from time to time, pass laws, applicable to all railroad corporations in the State, establishing reasonable maximum rates of charges for the transportation of passengers and freights, and providing for the correction of abuses,

> the prevention of unjust discriminations between through and local or way freight and passenger tariffs, and for the protection of the just rights of the public, and shall enforce such laws by adequate penalties."
>
> Art. 11, sec. 9 Const. W. Va.
>
> *Railroad Company* v. *Transportation Company*, 25 W. Va. 324;
>
> *Peik* v. *Chicago Northwestern Ry. Co.*, 94 U. S. 164, (24 L. Ed. 97.)
>
> *Shields* v. *Ohio*, 95 U. S. 319, (24 L. Ed. 357.)

The question of confiscation of the plaintiff's property sought to be raised by plaintiff in its bill, and denied by the defendants in error in their answer, was eliminated from consideration in this case. The plaintiff in error abandoned that contention and did not attempt to take proof to prove this allegation of its bill. The state court did not pass on the question, and we take it this court will not consider it.

**Penalty Provision of Two Cent Act Not Now in Question.**

The provision of the Two Cent Passenger Act fixing the penalty for violation thereof is not now in question in this cause. The Supreme Court of Appeals of West Virginia in the *Coal & Coke case, supra*, eliminates that question by holding:

> "By the institution of a suit to determine whether such a statute is confiscatory in its operation in a particular case, such corporation alters its status from that of a mere corporation, engaged in the public service, to that of a contestant of the legislative claim of right to take its property without due process of law; and, in the absence of expression of intent to the contrary, it is presumed the legislature did not intend to affect, or interfere with, the assumption or maintenance of such status, nor to legislate upon the subject of such remedy; and the penal clause of such a statute, silent on the subject of remedy, has no application, while a suit is pending, in good faith, for the determination of such question." Syl. 26.
>
> "By the application of these rules and principles, a railroad company is excepted from the operation of the penalty clause of chapter 41 of the Acts of 1907, during the prosecution by it, in good faith, of a suit to determine whether said statute is confiscatory in its operation and effect, as applied to such company." Syl. 30.

The plaintiff in error is therefore not aggrieved thereby and cannot be heard to complain, even if this Court were inclined to the opinion that the penalties provided in the act of the legislature complained of were excessive. At the time of the institution of this suit, and at no time since then, have criminal proceedings been instituted against the plaintiff in West Virginia so far as defendants in error are advised. This suit is not a proceeding to enforce the penalty provisions of the law complained of and this Court will not consider the question of the constitutionality of the penalty clause.

This Court in May, 1909, said:

> "The Federal Supreme Court will not consider the question of the constitutionality of the clause of the Hepburn act of June 29, 1906, imposing penalties for violations of its provisions forbidding railway carriers from transporting in interstate commerce commodities with which they are associated or in which they are interested, in an action seeking to enforce such provisions by injunction or mandamus, in which no recovery of penalties is sought."
>
> *U. S. ex rel. Atty. Gen.* v. *Del. H. Co.*, 213. U. S. 366, (53 L. Ed. 836, syl. 8.)

The penalty clause of the act complained of by plaintiff cannot affect the validity of the other provisions of said act, because said penalty clause is "*wholly separable therefrom.*"

> "The possible invalidity of the clause of the Hepburn act of June 29, 1906, imposing penalties for violations of its provisions forbidding railway carriers from transporting in interstate commerce commodities with which they are associated, or in which they are interested cannot effect the validity of these provisions, since the penalty clause is wholly separable therefrom."
>
> *U. S. ex rel. Atty. Gen. v. Del. H. Co., supra.*, syl. 9.

We contend, however, that, even if the constitutionality of the penalty clause of said act could be raised in this Court, the same is not excessive as contemplated by the Constitution. The provisions of the Constitution against cruel and unusual punishments are generally understood as prohibiting any cruel or degrading punishments not known to the common law, and probably also those degrading punishments which had become obsolete when the Constitution was adopted, and punishments so disproportionate to the offense as to shock the sense of the community. The penalty clause

of the act complained of does not meet that condition. The Supreme Court of the State of Iowa, page 341, in dealing with a similar statute to the one here in question, says:

> "It is urged that the fines imposed by the statutes for its violation are excessive, and forbidden by section 17, article 1, of the state constitution. The fines are intended to enforce obedience to the law by corporations having great incomes and controlling vast properties. The legislature, in exercise of its wisdom, fixed penalties which, if imposed upon individuals, might appear excessive, but when imposed upon corporations would be esteemed no greater than is necessary to enforce obedience to the statute. The railroad companies have a ready and efficient way of avoiding these severe pealties, namely, by obeying truly the laws of the state. If they do this, they are in no danger of the penalties; if they do not, they are in no condition to complain of the laws."
>
> *B. C. & N. Ry. Co.* v. *Dey*, 82 Iowa 312.

It has been decided by the Virginia courts that only the minimum penalty is considered when passing upon the constitutionality of the penalties provided by the legislature. That court said:

> "The imposition and regulation of fines is within the discretion of the Legislature, and its discretion will not be questioned by the courts except where the minimum penalty is so excessive as to shock the sense of mankind."
>
> *Southern Express Co.* v. *Walker*, 92 Va. 59, syl. 2.

The federal statutes fixing the penalties for violation of federal laws are much more severe than penalties provided in the statute complained of. For instance, the anti-pass law provides that a person found guilty of violating the same shall be fined not less than $100.00 nor more than $2,000.00 for each offense; see Supplement to Federal Statutes Annotated, 1909, p. 257. The Interstate Commerce Act provides, for a discrimination in passenger rates etc., a penalty not to exceed $5,000.00 for each offense, and under certain conditions, in addition to said fine, imprisonment in the penitentiary for a term not exceeding two years, or both said fine and imprisonment in the discretion of the court; see section 10 of Interstate Commerce Act, 3 Fed. Stat. Anno. 835; and in addition to the fine and imprisonment there is also a civil penalty or remedy; see

section 9 of said Interstate Commerce Act, 3 Fed. Stat. Anno. 833. See also penalties for violation of postal laws and counterfeiting laws which are largely in excess of the penalties provided in the statute involved in this suit.

Even if the state court passed upon the penalty provision of the statute, there was no error committed, as shown by the foregoing authorities, and the judgment or decree in that respect should be affirmed.

**The Classification of the Railroads in the Statute Complained of is Just and Founded upon Substantial Differences.**

The plaintiff in its bill alleges that chapter 41 of the Acts of the Legislature of West Virginia of 1907 is unconstitutional and void because of the classification therein of the railroads doing business in this state. We contend that there is no justification for this allegation. The classification is just and founded upon substantial differences. This question is no longer an open one in this court and the other courts of this country. The classification of railroads based upon the length of line has been held by this court to be "a more constant test" than other classifications. Mr. Justice Gray, speaking for the Court, says:

> "The Legislature in the exercise of its power of regulating fares ad freights, may classify the railroads according to the amount of the business which they have done or appear likely to do. Whether the classification shall be according to the amount of passengers and freight carried, or of gross or net earnings during a previous year, *or according to the simpler and more constant test of the length of the line of the railroad, is a matter within the discretion of the Legislature.* If the same rule is applied to all railroads of the same class, there is no violation of the constitutional provision securing to all the equal protection of the laws."
>
> *Dow* v. *Beidelman*, 125 U. S. 680 (31 L. Ed. 841.)

There is quoted with approval in the Dow-Biedelman case the holding of the court in the case of *C., B. & Q. R. Co., v. Cutts*, 94 U. S. 155 (24 L. Ed. 94). The Court says:

> "The statute divides the railroads of the state into classes, according to business, and establishes a maximum of rates for each of the classes. It operates un-

> iformly on each class, and this is all the Constitution requires, * * * * * *. It is very clear that a uniform rate of charges for all railroad companies in the state might operate unjustly upon some. It was proper, therefore, to provide in some way for an adaptation of the rates to the circumstances of the different roads; and the general assembly in the exercise of its legislative discretion, has seen fit to do this by a system of classification. Whether this was the best that could have been done is not for us to decide. Our province is only to determine whether it could be done at all, and under any circumstances If it could, the Legislature must decide for itself, subject to no control from us, whether the common good requires that it should be done."

The classification of the "Two Cent Passenger Act" complained of by plaintiff, operates uniformly upon all railroads in similar circumstances, and is therefore no violation of the equal protection of the law, although it does not operate uniformly upon the different classes.

> *American Sugar Refining Co.* v. *Louisiana*, 179 U. S. 89.

This court has uniformly held that state legislatures have a wide discretion in classifying railroads and other property. As illustrative of this proposition we cite the following authorities:

> *Williams* v. *Arkansas*, 217 U. S. 79;
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> *Watson* v. *Maryland*, 215 U. S. 646 (54 L. Ed. —);
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> *United States Ex. Rel. Atty. Gen.* v. *Delaware & H. Co.*, 213 U. S. 366 (53 L. Ed. 836, Syl. 7);
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> *McLean* v. *Arkansas*, 211 U. S. 539 (53 L. Ed. 315 Syl. 2);
>
> *Hammond Packing Co.* v. *Arkansas*, 212 U. S. 322 (53 L. Ed. 530 Syl. 2);
>
> *Erb* v. *Morasch*, 177 U. S. 584 (44 L. Ed. 897);
>
> *A., T. & S. Fe R. R. Co.* v. *Matthews*, 174 U. S. 96 (43 L. Ed. 909);
>
> *Budd* v. *New York*, 143 U. S. 517 (36 L. Ed. 247);
>
> *N. Y., N. H. & H. R.* v. *New York*, 165 U. S. 628 (41 L. Ed. 853);
>
> *Mo. K. & T. R. Co.* v. *May*, 194 U. S. 267 (48 L. Ed. 972);
>
> *S. T. & I. of H. R. Co.* v. *Savannah*, 198 U. S. 392 (49 L. Ed. 1097);

*Mo. Pacific* v. *Mackey*, 127 U. S. 205 (32 L. Ed. 107);

See also the case of the *Brown-Forman Co.* v. *Kentucky*, decided by this Court, May 16, 1910.

The Supreme Court of Appeals of West Virginia has held the Act constitutional. That court said:

"Chapter 41 of the Acts of 1907 is, in all respects, valid on its face."

*Coal & Coke Ry. Co.* v. *Conley & Avis, supra*, Syl. 42.

See *State of Connecticut* v. *Woodruff*, 153 U. S. 689 (38 L. Ed. 869).

From the foregoing authorities it will be seen that the state court did not err in holding the "Two Cent Passenger Act" valid, and therefore the judgment or decree of that court ought to be affirmed.

**The Statute Complained of Does Not Regulate or Interfere With Interstate Commerce Within the Constitutional Prohibition.**

Chaptter 41, Acts of the Legislature of West Virginia of 1907—the Two Cent Passenger Act complained of does not pretend to regulate interstate passenger rates; it prescribes a maximum rate for intrastate fares only. For the convenience of the court the act is copied in full and is as follows:

"Chapter 41.

(Senate Bill No. 15.)

"AN ACT relating to and regulating passenger rates upon railroads in the state of West Virginia, and prescribing penalties for the violation thereof.

*Be it enacted by the Legislature of West Virginia*:

"Sec. 1. That all railroad corporations organized or doing business in this state under the laws or authority thereof shall be limited in their charges for the transportation of any person with ordinary baggage, not exceeding one hundred pounds in weight, to the sum of two cents per mile, or fractional part of a mile, but the fare shall always be made the multiple of five nearest reached by multiplying the rate by the distance, and if for any one passenger the rates herein provided shall be less than five cents, the said sum of

five cents may be charged as a minimum; children under twelve years of age shall be carried for one-half fare above prescribed; *provided*, that any passenger boarding a train at a station where tickets are sold, without having procured a ticket, may be charged an additional fare of ten cents, for which sum a rebate slip, redeemable in money, upon presentation to any ticket agent of the company, shall be issued and delivered to such passenger; and *provided, further*, that nothing in this act shall apply to any railroad in this state under fifty miles in length and not a part of, or under the control, management or operation of any other railroad, over fifty miles in length, operating wholly or in part in the state.

"Sec. 2. Any railroad company which shall charge, demand or receive any greater compensation for the transportation of any passenger than is authorized by this act, shall be fined for each offense not less than fifty dollars nor more than five hundred dollars; *provided*, that nothing contained in this act shall apply to electric lines and street ralways owned or operated in this state.

"Sec. 3. All acts or parts of acts inconsistent herewith are hereby repealed."

It is plain to be seen that the foregoing act does not attempt to regulate interstate commerce. It deals only with intrastate passenger traffic. It does not regulate the fare to be charged for passengers going from a point in West Virginia to some point in another state. It does not regulate the fare for a passenger coming from some point in another state to some point in West Virginia. It does not regulate the fare of passengers coming from another state through West Virginia to another state. It only regulates the fare of passengers from a point in West Virginia to another point in West Virginia, the entire distance being traveled within West Virginia. The railroad companies construed the act in this manner when they put the law into effect. It is so construed by the citizens of West Virgina and by the traveling public generally. The law, therefore, does not directly operate on interstate commerce. If it operates on interstate commerce at all. it is merely incidental. The Supreme Court of Appeals of the State of West Virginia construes the law as operating solely on interstate passenger traffic.

*Coal & Coke Ry. Co.* v. *Conley & Avis, supra.*

This court has held in numerous cases that state legislation in a

variety of ways may affect interstate commerce and persons engaged in it, without constituting a regulation of interstate commerce within the constitutional prohibition. This Court has said:

> "It is well settled that the state may make valid enactments in the exercise of its legislative power to promote the welfare and convenience of its citizens, although in their operation they may have an effect upon interstate traffic."
>
> *Pa. R. R. Co.* v. *Hughes*, 191 U. S. 477 (48 L. Ed. 268, 272.)

Counsel for defendants in error contend, that if the state law compalined of by plaintiff in any manner interferes with interstate passenger traffic, it is too remote and indirect to fall within the constitutional prohibition. The law involved in this litigation does not, in terms, embrace interstate traffic. The regulation is restricted to "all railroad corporations organized or doing business in this state (West Virginia) under the laws or authority thereof."

Construing a Kentucky statute relating to long and short distance hauls, this court, on page 518, said:

> "It is plain that the provision in question does not in terms embrace the case of interstate traffic. It is restricted in its regulation to those who own or operate a railroad within the state, and the long and short distances mentioned are evidently distances upon the railroad line within the state. The particular case before us is one involving only the transportation of coal from one point in the state of Kentucky to another by a corporation of that state."
>
> *L. & N. R. R. Co.* v. *Kentucky*, 183 U. S. 503, (46 L. Ed. 298.)

Syllabus 5 of the case last quoted above is as follows:

> "Any interference with interstate commerce by the enforcement of state laws prohibiting a greater charge for shorter than for longer hauls is too remote and indirect to be regarded as an unconstitutional interference with interstate commerce."

The Interstate Commerce Commission has held, in deciding the case of *Kurtz* v. *Pa. Co. et al.*, that the use of local state rates may legally yield a lower charge than a through interstate rate. The Commission said:

> "Let us assume that the through rate from Charleston to Savannah established by the Atlantic Coast

Line was $6, while the rate from Charleston to the State line was $3, and from the State line to Savannah $2. It is apparent that if a passenger applied to the Railroad company at Charleston for a ticket to Savannah, that company must sell him a through ticket for $6, and would have no right to sell two local tickets for $5; for that would be an evasion of its published tariff rates, upon the other hand this Commission has stated in its administrative rulings, and now repeats, that the passenger may properly pay his fare from Charleston to the State line and again from the State line to Savannah, although he thereby obtains through transportation between these points for less than the published through rate, and although he does so, knowing that he is to go from Charleston to Savannah, and deliberately seeking this means of obtaining transportation at less than the through rate.

"The reason for this is that not the intent of the parties but the actual transaction must be regarded, as was held by the United States Supreme Court in *Gulf, Colorado & Santa Fe Ry. Co.* v. *Texas*, involving the transportation of a carload of grain from a point in North Dakota to a point in Texas, at a rate from the point of origin to Texarkana and a rate from Texarkana to destination, which, when combined, were less than the through rate. The Charleston & Savannah Railroad Co. sells to all the world tickets from Charleston to the State line for $3, and again from the State line to Savannah for $2. A passenger may purchase his ticket to the State line, and when he arrives there that contract of transportation is at an end. He now purchases another ticket from the State line to Savannah and a new contract of transportation begins. If the regulations of the railroad company permit it, he may, instead of purchasing a ticket, pay his cash fare upon the train, to the same effect. He has, indeed, secured through transportation for less than the through rate; but he has done so by putting together two local transportations at the local rates.

"Congress might undoubtedly say that this shall not be done, but up to the present time has not so declared."

*Kurtz* v. *Pa. Co. et al.*, 16 I. C. C. R. 410 (1909).

**Holding of State Court Conclusive on Subject.**

The holding of a state court that a state statute does not apply

to or interfere with interstate commerce is conclusive and will be followed by the Federal courts. This court has held:

> "The construction by a state court of a state license statute, holding that it does not apply to the interstate business of an express company will be followed by the Federal courts."

*Osborn* v. *Florida*, 164 U. S. 650 (41 L. Ed. 586, Syl. 1).

To the same effect as the foregoing is the case of *Kehrer* v. *Stewart*, 197 U. S. 60 (49 L. Ed. 663.) See also the cases of the *Standard Oil Co. of Kentucky* v. *State of Tennessee*, 217 U. S. 413 (54 L. Ed.....), and the *Southwestern Oil Co.* v. *State of Texas*, 217 U. S. 114 (54 L. Ed.....).

From the foregoing authorities it will be seen that the State court did not err in holding, if it passed upon the subject at all, that said "Two Cent Passenger Act" complained of did not interfere with interstate commerce within the constitutional prohibition.

Counsel for the defendants in error respectfully submits that the writ of error should be dismissed with costs to the defendants in error. But if this honorable court should be of the opinion that the writ of error should not be dismissed, then Counsel for the defendants in error respectfully but most earnestly contend that the judgment or decree of the state court should be affirmed with costs to the defendants in error.

It is manifest that the writ of error in this cause was taken for delay only. Every week the railroad company can keep the cause in court means hundreds of dollars to it, with like amount taken from intrastate travelers over its line within the State of West Virginia, to which the railroad company is not entitled. The principles of the questions involved have been settled long since by this court, and it seems to me no further argument and citation of authorities are necessary.

Respectfully submitted,

WILLIAM G. CONLEY,

*Attorney General for the State of West Virginia and Counsel for the Defendants in Error.*

Charleston, W. Va., Nov. 15, 1910.

NO. 657.

# Supreme Court of the United States.

OCTOBER TERM, 1910.

THE CHESAPEAKE & OHIO RAILWAY COMPANY,
*Plaintiff in Error,*

*versus*

WILLIAM G. CONLEY, ATTORNEY GENERAL OF THE STATE OF WEST VIRGINIA, ET AL.,
*Defendants in Error.*

BRIEF OF COUNSEL FOR DEFENDANTS IN ERROR UPON MOTION TO ADVANCE CAUSE FOR EARLY HEARING.

## STATEMENT.

We deem it unnecessary to set out herein a brief statement of the matters involved in this cause, for the reason that such statement is set out in the motion to advance, found on pages two, three and four thereof, to which the Court's attention is directed. A brief statement of the matters involved is also contained in the brief of counsel for plaintiff in error, which is correct in the main, but the following statement contained on page two is not correct, and is evidently inserted through mistake, to-wit:

> "The Railway Company then obtained an appeal to the Supreme Court of the State of West Virginia, and on the 11th day of July, 1910, the Supreme Court of the United States refused an appeal and affirmed the decision of the lower court."

It will be perceived from the record in this cause that the Supreme Court of Appeals of the State of West Virginia refused to grant a writ of error or an appeal to the Railway Company, and that the Railway Company did not obtain such appeal to that court. No application was made by the Railway Company to the Supreme Court of the United States for an appeal, but the writ of error was granted by the state court to this Court. If this Court had "refused an appeal and affirmed the decision of the lower court," this cause would not now be in this Court. We call the Court's attention to this error that you may not be misled thereby. No final order was entered by any of the state courts in this cause which was afterwards set aside or modified, as contended by counsel for plaintiff in error.

## ARGUMENT.

The State of West Virginia is not named as a party defendant to this cause. She could not be made a defendant without her consent, and such consent was not given. A state can act by its officers and agents only. Certain of the state's officers are made parties defendant solely because they are such officers. Courts look to the substance and not to the shadow. The highest Court in West Virginia has declared the law in controversy constitutional as to the plaintiff in error. The state, therefore, is interested in enforcing this law. The state, for the purposes of public interest and the enforcement of her constitutional laws, ought to be considered a party in interest for the purposes of this motion. If this contention be correct, then this Court would, as a matter of right, advance this cause for an early hearing, on the motion of the state, under section 949 of the Revised Statutes of the United States.

We do not contend that this cause comes under another provision of said section relating to the advancement of a cause when the revenue laws of a state are involved, for no revenues due the state are involved in this litigation. The argument of counsel for the Railway Company contained in their brief on pages two and three and the authorities cited for that reason are not applicable here.

Counsel for the Railway Company contend that the defendants as such officers have no public duty to perform in the enforcement of the act involved during the pendency of this suit, and cite the

case of the *Coal & Coke Railway Company* v. *Conley et al.*, 67 W. Va. 129. This cause is not paralell with the Coal & Coke case.

In the Coal & Coke case the court held the act complained of unconstitutional in its operation as to that railroad, and therefore there was no law to enforce against it; but in this cause the state courts held the law constitutional as to the plaintiff in error, and dissolved the injunction against the defendants. The law being constitutional as to the plaintiff in error, the officers should be left free to prosecute it when it violates such law. Officers should not be enjoined from enforcing a constitutional law. They should not be prevented from performing their official duties. The state is interested in enforcing her laws through her duly qualified officers, hence this motion for a prompt and speedy determination of this cause. The state should not be embarrassed through the action of the courts in enjoining the enforcement of a constitutional law. When such injunctions are granted a speedy hearing should be had.

This cause is not one between private parties, nor a cause involving only private interests, as contended by counsel for plaintiff in error. It is a suit against only officers of a state government. It is a matter involving the rights of a sovereign state of the Union to enforce a law regularly passed by its legislature, approved by its executive and upheld by its judicial department. The authority of a state to enact constitutional laws is a mockery if the power to enforce them is annulled by injunction. The attorney general and the prosecuting attorneys are bound by their oaths of office to enforce this law. This duty is suspended. Governments are instituted for the benefit of the governed, and especially to protect the rights of its citizens. To say, as this Railroad Company does, that the right and duty of the state to protect its citizens against its unlawful exactions, in the face of a law held constitutional as to it, is a "mere private matter," is on the borderland of the ridiculous. It seems to me this right and this duty of the state are fundamental. If the state cannot discharge this fundamental duty it is difficult to see what excuse it has for its being.

If, however, in the wisdom of this Court, the State of West Virginia is not considered a party in interest to this cause for the purposes of this motion, we then earnestly but respectfully contend that the hearing of this cause should be advanced under rule 26, clause 7, of the rules of this Court, because of the "special and peculiar circumstances" surrounding it, which no doubt will im-

press the Court by an inspection of the record, the motion to dismiss, and the motion to advance. Under said rule 26 a motion to advance is, as a matter of course, discretional with the Court.

We believe we are fully justified in the contention that the writ of error was taken by the Railway Company for the sole purpose of delay. If the Court will carefully analyze the counsels' brief for said Company, it will find therein, in effect, an admission that the writ of error was taken for that purpose. In opposing this motion the Railway Company occupies a strange position to say the least. It came here by writ of error for the purpose of having its rights adjudicated and protected, and having come here for that purpose, it uses all the ingenuity of its able and learned counsel to fight off the adjudication it so earnestly seeks. And yet, we are told it is not seeking delay. If they want an adjudication, why oppose it? If they do not want delay, why oppose an early hearing? If the Railway Company does not have a monetary interest in such delay, why permit its counsel to oppose this motion? The objection to advancement was not interposed unselfishly. It was not interposed because the advancement of this cause would perchance delay the hearing of other causes for two or three hours. Delay means a large monetary income to the Railway Company, and a corresponding exaction from the traveling public.

It is difficult for the average citizen and taxpayer to understand why he must obey the law until it is declared invalid, when a railroad company, allowed large rights and privileges even to the taking of private property for its use, can, by its own act, set aside, suspend and annul a law of the state enacted to protect such citizen from its exactions. And when he learns that this railroad company appeals to the courts for the protection of its rights and then fights an adjudication of these rights by the tribunal to which it appeals, it is not strange that he wonders how this comports with the solemn constitutional assurance, that—

> "Justice shall be administered without sale, denial or delay."

It is of the highest importance to our whole system of free government that a great corporation like the plaintiff in error shall not, under the forms of law and the protection of the courts, be allowed to profit by its own wrong and be allowed to delay litigation it has instituted in its own behalf, in order that it may put money it has unlawfully exacted from the public into its treasury.

At the beginning of paragraph 6, at the top of page 6 of the brief of the plaintiff in error, in denial that this cause was brought here for delay, counsel in part, say:

> "A glance at the record of this cause will show that it is not evident that the writ of error was taken for delay only. The defendants in error permitted the matter to stand in the circuit court of Kanawha county on a final decree awarding an injunction for over a year, without any motion being made or pleas entered."

This statement is misleading and tends to deceive the Court. The hearing of this cause in the circuit court of Kanawha county was delayed by verbal agreement of counsel, awaiting a final decision in the Coal & Coke case. The facts are these, and are well known by part of counsel representing the plaintiff in error, to-wit:

One year after the "Two Cent Passenger law" of West Virginia was enacted the Coal & Coke Railway Company brought its suit in the circuit court of Kanawha county, praying for an injunction against William G. Conley, Attorney General of the State, and S. B. Avis, Prosecuting Attorney of Kanawha county, and inhibiting them from enforcing said law against the plaintiff. The two main contentions made by the plaintiff were (1) that the operation of the law was confiscatory as to the plaintiff, and (2) that the law was unconstitutional on its face. Under the first point, a large number of depositions were taken and exhibits filed, the record in the case making a printed volume of 648 pages. The circuit court of Kanawha county held the law unconstitutional on its face, and also confiscatory as to the Coal & Coke Railway, and issued a permanent injunction against the defendants. It was then that the plaintiff in error instituted this suit in said circuit court of Kanawha county, and of course that court, following its decision in the Coal & Coke case in holding said law unconstitutional on its face, granted a preliminary injunction in this suit, which is found on pages 20 to 22 inclusive of the printed record. When said order was entered on the 22d day of June, 1909, it was mutually agreed among counsel that no further proceeding would be taken in this cause until the decision of the Supreme Court of Appeals of West Virginia could be had in the Coal & Coke case upon the question of whether or not the "Two Cent Passenger law" was unconstitutional on its face. If that

court should hold said law unconstitutional on its face further litigation was useless. The Coal & Coke case was promptly appealed to the Supreme Court of Appeals of West Virginia, and that court held said act constitutional on its face and to that extent reversed the circuit court of Kanawha county. The defendants then took action in the case of the plaintiff in error, and the circuit court of Kanawha county, following the decision of the supreme court of that state in the Coal & Coke case, dissolved the preliminary injunction awarded in this cause on June 22, 1909, and directed the plaintiff to repay to persons holding its coupons the excessive passenger charges made by it, and dismissed this cause at the cost of the plaintiff in error. The record discloses that no evidence to sustain the contention of the plaintiff in error was introduced to show said act was confiscatory as to it. The plaintiff in error attempted to appeal to the Supreme Court of Appeals of the State of West Virginia but was refused such appeal, and that court gave the plaintiff in error a writ of error to this Court, which was perfected on the 18th day of July, 1910, as disclosed by the printed record. It will be perceived, therefore, that the Coal & Coke case was a *test* case as to whether said act was constitutional on its face; hence the statement of counsel for plaintiff in error, quoted above from page six of their brief in this cause, is misleading, tends to deceive this Court, and is a great surprise to counsel for defendants in error. We can only suppose that this misleading statement, like that referred to on page one of this brief, was made by inadvertence, or by counsel for plaintiff in error who are not familiar with the facts.

It will not avail the Railway Company anything for its counsel to contend in this Court that the decree entered by the trial court on the 22d day of June, 1909, was a final decree. The trial court did not so consider it. Counsel for the Railway Company and counsel for the defendants did not so consider it. It was not so treated by the trial court, or by counsel, or by litigants. That question was not raised in the state courts and cannot now be raised here. If it had been raised in the courts below and decided adversely to the Railway Company, it could not be raised here for the reason that the question is one of pleading in a state court, a question over which this Court does not take jurisdiction. This has been so often decided adversly to the Railway Company's contention that it is useless to cite authorities sustaining it.

Counsel for the Railway Company boast, on page seven of their brief, that—

"The fight is only just beginning."

Does this boast explain the fight for delay of a suit the Railway Company began? Does this boast explain why it abandoned in this cause its charge of confiscation? Is this boast a threat by the Railway Company, that after this cause is decided against it by this Court it will institute other suits charging confiscation and during the pendency of those suits continue to exact from the traveling public fare in excess of the maximum rate provided in said act? Is this boast a challenge to this Court and to the courts and to the legislature of West Virginia that it will not obey the law, and that it will continue to disregard the law? This challenge of the Railway Company, it seems to me, ought to be accepted by this Court, and this cause set for hearing at this term.

This cause should be advanced for an early hearing, because of the comity that exists between the departments of our dual system of government. This Court has repeatedly held that it would follow the decisions of the highest court of a state, respecting that state's constitution and statutes; and has even reversed its own holdings when they were in conflict with the decisions of the highest court of a state. The law involved in this cause has received the approval of all three of the departments of the West Virginia state government, and these departments are anxious for an early hearing herein.

The Supreme Court of Appeals of West Virginia acted promptly in this cause because of its importance to the public, as is disclosed by the record; because it is a suit in which the state is interested; because it is a suit in which the state's dignity and its right to enforce its laws to protect its citizens is involved. It is such a suit, therefore, that will call from this Court that consideration which is due from a great Court to a sovereign state of the Union.

We do not believe this Court will allow itself to be made the instrument of delay whereby the state of West Virginia may be badgered and humiliated, and its authority set at naught by a railway company which does business within that state by virtue of its grace, and to which state it is dependent for the protection of its property and the use of its courts.

We again call the Court's attention to the fact that plaintiff in error comes to this Court for an adjudication of its rights, and

at the same time fights an adjudication of the questions it has raised.

A speedy determination of the questions involved in this suit is of wide-spread and far-reaching consequence to the State of West Virginia, its citizens, and the other railroads of West Virginia; and we therefore earnestly and respectfully urge that this cause be advanced and set down for hearing and argument at the earliest possible date the Court may fix.

Respectfully submitted,

WILLIAM G. CONLEY,
*Attorney General of West Virginia.*

Supreme Court, U.S.
FILED
MAR 17 1911
JAMES H. McKENNEY,
Clerk.

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1910.

No. [redacted] 111.

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THE CHESAPEAKE & OHIO RAILWAY COMPANY, *Plaintiff in Error*,

v.

WM. G. CONLEY, ATTORNEY GENERAL OF THE STATE OF WEST VIRGINIA, ET AL., *Defendants in Error*.

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Motion of Defendants in Error to Advance Cause for Early Hearing.

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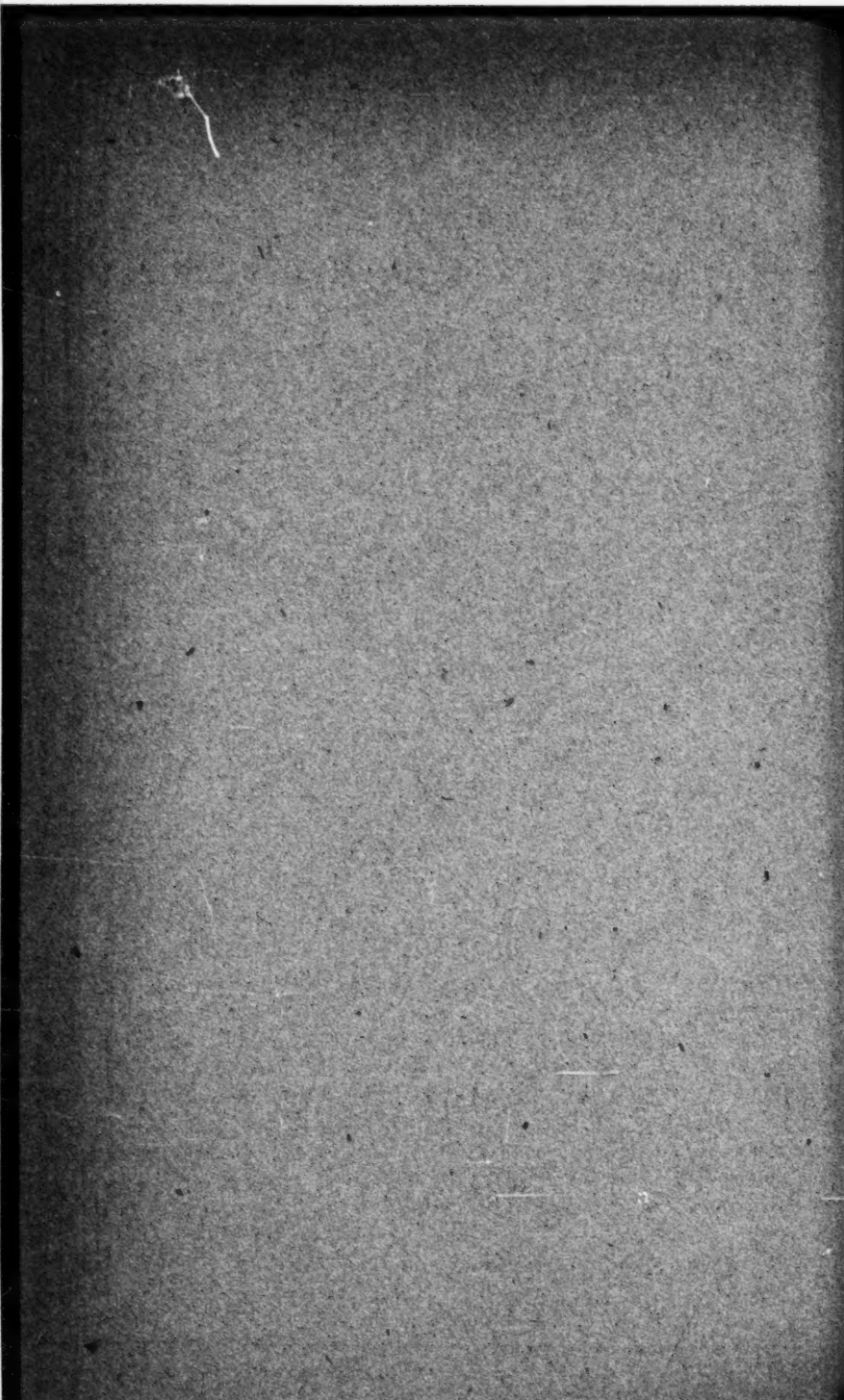
(File No. 22,278.)



No. 657.

# IN THE
# Supreme Court of the United States

OCTOBER TERM, 1910.

THE CHESAPEAKE & OHIO RAILWAY COMPANY, *Plaintiff in Error,*
v.
WM. G. CONLEY, ATTORNEY GENERAL OF THE STATE OF WEST VIRGINIA, ET AL., *Defendants in Error.*

## NOTICE.

*To the Chesapeake & Ohio Railway Company:*

You are hereby notified that at 12 o'clock noon, Monday, March 27, 1911, or as soon thereafter as counsel can be heard, the following motion to advance the above entitled cause will be presented to the Supreme Court of the United States.

WILLIAM G. CONLEY,
*Attorney General of West Virginia.*

## MOTION TO ADVANCE.

Comes now, by counsel, defendants in error, Wm. G. Conley, Attorney General of the State of West Virginia; S. B. Avis, Prosecuting Attorney Kanawha County; C. L. Estep, Prosecuting Attorney Boone County; Jean F. Smith, Prosecuting Attorney Cabell County; George Love, Prosecuting Attorney Fayette County; J. S. McWhorter, Prosecuting Attorney Greenbrier County; R. D. Steed, Prosecuting Attorney Lincoln County; E. H. Green, Prosecuting Attorney Logan County; R. L. Keadle, Prosecuting Attorney Monroe County; S. R. King, Prosecuting Attorney Nicholas County;

F. R. Hill, Prosecuting Attorney Pocahontas County; C. C. Knapp, Prosecuting Attorney Putnam County; Hugh A. Dunn, Prosecuting Attorney Raliegh County; T. N. Read, Prosecuting Attorney Summers County; D. B. Hardwick, Prosecuting Attorney Wayne County; and move this court to advance the above entitled cause for an early hearing.

## STATEMENT OF FACTS INVOLVED IN SUIT.

The suit of The Chesapeake & Ohio Railway Company, plaintiff in error, against Wm. G. Conley, Attorney General of the State of West Virginia, and others, defendants in error, was instituted in the Circuit Court of Kanawha County, West Virginia, on the 26th day of May, 1909. The plaintiff in this suit sought an injunction against the defendants in error enjoining, restraining and prohibiting them as officers from instituting or bringing, or causing to be instituted or brought, any action, suit or prosecution against the plaintiff in error, its officers, agents or employees, to recover any fine, penalty or damages accruing under an Act of the Legislature of West Virginia, passed February 20, 1907, and commonly known as the "Two Cent Passenger Act," which act fixes the maximum passenger rate per mile, or fractional part thereof, at two cents on all railroads of fifty miles or over in length on all intra-state passenger travel in West Virginia. The plaintiff further sought to have said act declared unconstitutional so far as it relates to the plaintiff in error's lines of railroad in West Virginia, and also to enjoin said defendants in error, and each of them, from attempting to procure indictments against the plaintiff in error for its violation of said passenger act in charging more than two cents per mile for each passenger for intra-state West Virginia travel.

On the 22nd day of June, 1909, the defendants in error specially appeared and moved to dismiss the plaintiff's bill upon the ground that it was a suit against the State of West Virginia and prohibited by the Constitution of that State, and for the further reason that none of the defendants had any personal interest in the cause. Record page 23. This motion was overruled and a demurrer was filed by the defendants in error to the plaintiff's bill setting up ten specific grounds. Record, pp. 23-4-5. This demurrer was also overruled, and thereupon the Circuit Court of said Kanawha

County on that day entered a decree, as prayed for in the plaintiff's bill, enjoining said defendants in error from enforcing said law. Record pp. 20-22.

On the 28th day of June, 1910, the defendants in error filed their joint and separate answer and moved to dismiss the preliminary injunction theretofore awarded against them, to the filing of which answer the plaintiff objected, and also demurred thereto, (Record pp. 42-3-4) both of which were overruled by the court; and the plaintiff announcing it did not desire to take proof to maintain its bill, said Circuit Court on said 28th day of June, 1910, entered an order dissolving said injunction and dismissing the cause at the cost of the plaintiff in error, and directed in said order that the railroad company take up, redeem and pay to the respective parties holding the coupons issued by it under the court's order entered June 22, 1909, the amount due. Record, pp. 25-27.

Thereupon the plaintiff moved a stay of sixty days to procure an appeal to the Supreme Court of Appeals of the State of West Virginia, which stay was granted, and on the 11th day of July, 1910, the plaintiff presented its petition to the Supreme Court of Appeals of West Virginia, praying for an appeal to the decree of the Circuit Court of Kanawha County entered on the 28th day of June, 1910, which appeal was refused by the Supreme Court of Appeals, as shown by order entered on page 1 of the record. And thereupon the plaintiff filed its petition to said court; praying that it grant a writ of error to this court, which writ of error was granted, as shown by the record at pp. 47-48 *et seq.* The printed record was filed here July 30, 1910.

On the 12th day of December, 1910, the defendants in error, by counsel, moved this court to dismiss the writ of error or to affirm the judgment or decree below, which motion this court continued until this cause could be heard on its merits.

The Two Cent Passenger Act in controversy in this cause is chapter 41 of the Acts of the Legislature of West Virginia of 1907, which limited the maximum passenger charge to be made by any railroad fifty miles or over in legth operating in West Virginia to two cents per mile per passenger, and since the granting of said injunction by the Circuit Court of Kanawha County on the 22d day of June, 1909, the plaintiff in error has been and is now charging

not less than three cents per passenger per mile for all intra-state West Virginia passenger traffic.

## REASONS FOR EARLY HEARING.

This cause should be advanced for an early hearing for the following reasons, to-wit:

*First.* Because the pendency of this suit in this Court suspends the effect and operation, as to plaintiff, of a law of the State of West Virginia, duly enacted by the Legislature thereof, approved by the Governor of said State, and pronounced constitutional and valid by the Supreme Court of Appeals, the court of last resort, of said State.

*C. & C. Ry. Co. v. Conley & Aris*, 67 W. Va. 129.

*Second.* Because the pendency of this suit in this Court prevents and inhibits the Attorney General of the State of West Virginia, and Prosecuting Attorneys of the several counties through which the plaintiff's railway runs in said State, from performing the duties enjoined upon them by law, of enforcing the law of said State, declared constitutional and valid by the said Supreme Court of Appeals of said State.

*Third.* Because by the pendency of this suit in this court the said railway company is enabled to charge, and has been charging and does now charge to persons traveling on their railway lines in the State of West Virginia, three cents per mile, and in some instances more than three cents per mile, and has been compelling and does now compel such persons to pay such rates, in violation of said law of the State of West Virginia; and while it is true that said railway company issues to each of such persons what is called a coupon, showing the excess paid by each of such persons for passenger fare above the said legal rate of two cents per mile, yet it is further true that such coupons are in many instances for small amounts, that many passengers receiving them do not understand their purpose or object, that there is no central place where such coupons can now be deposited for future redemption, and therefore a large portion of them are lost and mislaid to the great injustice of such passengers and to the great benefit of said railway company. In no event is it provided that persons paying in ex-

cess of the legal rate can recover interest on the money paid by them in the event it is finally determined by this court that they have been compelled to pay an illegal rate, which operates to the benefit of the said railway company, and to the injustice of the persons compelled to pay the illegal rate of fare.

*Fourth.* Because two other like suits are now pending with two other railroads in said state involving the same questions and law that are involved in the suit now pending in this Court; and other like suits are threatened by still other railroads in said State, thereby making it a matter of great public importance that the questions involved in this suit shall be speedily and finally determined and adjudicated by this Court.

*Fifth.* Because some railroad companies operating lines in said State of West Virginia have been obeying the said law, and are charging only two cents per mile to passengers traveling on their lines within said State, and if the said law is not constitutional and valid it operates a hardship on these said lines which are obeying the law, and operates a discrimination between the railroad corporations doing business within the State of West Virginia.

*Sixth.* Because it is evident that this writ of error was taken for delay only. Every day the railroad company can delay the hearing of this cause means many dollars to it by reason of the increase in the passenger rate it is now charging over the legal rate of two cents per passenger per mile for all intra-state West Virginia travel. The principles involved in this cause have long since been settled by this Court, as we believe is clearly shown in the brief filed herein on the motion to dismiss or to affirm the judgment or decree of the state court, to which brief this Court's attention is directed.

For the foregoing reasons we respectfully submit that the public interests of the State of West Virginia as well as the private interests of all the traveling public who use the line of the plaintiff railroad company within the State of West Virginia are deeply concerned in an early determination of this writ of error, and of the question of whether chapter 41 of the Acts of the Legislature of West Virginia of 1907 is constitutional, as construed by the Supreme Court of Appeals of that State. We respectfully and earnestly request the advancement of this cause and the hear-

ing of the argument therein at the earliest possible date that the Court may fix for that purpose.

Respectfully submitted,

WILLIAM G. CONLEY,

*Attorney General for West Virginia.*

Charleston, W. Va., March 10, 1911.

27

Office Supreme Court, U. S.
FILED.
OCT 4 1911
JAMES H. McKENNEY,
CLERK.

# Supreme Court of the United States

## OCTOBER TERM, 1911

NO. [redacted] 111.

THE CHESAPEAKE & OHIO RAILWAY COMPANY, *Plaintiff in Error,*

*v.*

WM. G. CONLEY, ATTORNEY GENERAL OF THE STATE OF WEST VIRGINIA, *Et Al., Defendants in Error.*

BRIEF ON BEHALF OF DEFENDANTS IN ERROR ON FINAL HEARING,

BY

WILLIAM G. CONLEY

ATTORNEY GENERAL OF WEST VIRGINIA

FILE NO. 22,278

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## TABLE OF CONTENTS


| | Pages |
|---|---|
| Statement of Facts | 1-3 |
| Proceedings in United States Court | 3 |
| Explanatory | 3 |
| Argument and Authorities Cited | 3-66 |
| State Has Power to Regulate Intrastate Railroad Rates | 3-4 |
| All Statutes are Presumed to be Constitutional | 4-6 |
| Questions of Pleading Raised in State Courts are Finally Settled | 6-7 |
| Reasons Set Up by Plaintiff Why Statute is Unconstitutional | 7-8 |
| The Statute is Not Confiscatory as to Plaintiff | 8-14 |
| Entire Earnings from All Sources Must be Considered | 11-14 |
| Statute is Not Unconstitutional Because of Penalties Prescribed | 14-24 |
| This is Not a Suit to Enforce the Penalty Provision | 16 |
| Penalty Clause Does Not Affect Other Provisions | 16-17 |
| Penalty Clause Not Excessive as Contemplated by Constitution | 17-19 |
| Other Statutory Penalties in West Virginia | 19-21 |
| Penalties in Other States for Similar Offenses | 21-22 |
| Penalties Provided by Federal Statutes More Severe | 22-23 |
| Eighth Amendment to Federal Constitution Does Not Apply to State Legislatures and State Courts | 23-24 |
| Chapter 41 of 1907 Does Not Interfere with Interstate Commerce, etc., | 24-41 |
| Power to Enact Statute Comes Within Police Power of State | 26-30 |
| Statute Places No Burden on Interstate Commerce | 30-31 |

Pages

Incumbent on Plaintiff to Prove Interference..... 31-32
Congress Cannot Regulate Intrastate Commerce..... 32
Two Sovereign Powers in Each State—State and Federal ..... 33-35
Federal Act Relates Only to Interstate Commerce..... 35-37
Interstate Railroads Subject to Regulation as to Intrastate Commerce ..... 37-38
Lowering of Intrastate Rates Does Not Affect Interstate Rates ..... 39-41

The Statute is Not Unconstitutional Because of Classification, is Just and Founded Upon Substantial Differences ..... 41-57
The States Have Constitutional Power to Classify Railroads ..... 43-45
Railroads Classified on Length of Line "More Constant Test" ..... 45-47
Statute Uniform on Each Class—If it Does Not Reach, Common Law Applies ..... 47-48
Statute Does Not Repeal Former Rate Regulation..... 48-49
Other Classifications ..... 50-52
Legislature the Judge of Necessity of the Law..... 52
Objections to Statute Not Well Founded..... 52-54
Classification Could be Eliminated and Remainder Stand 54-55
Cotting and Connolly Cases Not Applicable to This Case 55-56
Application of Fifth and Fourteenth Amendments..... 56

Two Cent Passenger Legislation of Early Origin..... 56-58

Argument of Plaintiff Answered by Opinions of State and Federal Courts ..... 59-60

Nothing in Record to Sustain Contentions of Plaintiff..... 60

"Electric Lines" Not in Class With Steam Railroads..... 61-64

Motive of the Legislature Cannot be Impugned..... 64

Conclusion ..... 64-66

Supplement ..... 67-70

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1911.

NO. 657.

THE CHESAPEAKE & OHIO RAILWAY COMPANY, *Plaintiff in Error,*

*v.*

WM. G. CONLEY, ATTORNEY GENERAL OF THE STATE OF WEST VIRGINIA, *Et Al., Defendants in Error.*

BRIEF ON BEHALF OF DEFENDANTS IN ERROR ON FINAL HEARING.

## STATEMENT OF FACTS.

This was a chancery cause instituted by The Chesapeake & Ohio Railway Company, a corporation, against William G. Conley, Attorney General of the State of West Virginia, and the prosecuting attorneys of the several counties in said state through which the railroad lines of the plaintiff company passes. This cause was instituted in the Circuit Court of Kanawha County, West Virginia, on the 26th day of May, 1909. The plaintiff in error sought an injunction against the defendants in error to enjoin, restrain and prohibit them, as officers, from instituting or bringing or causing to be instituted or brought any action, suit or prosecution against said railway company, its officers, agents or employees to recover any fine, penalty or damages that might be recovered under an

Act of the Legislature of West Virginia, passed February 21, 1907, and commonly known as the "Two Cent Passenger Act," which act is chapter 41 of the Acts of the Legislature of West Virginia of 1907.

Said passenger act fixes the maximum passenger rate for each passenger per mile, or fractional part thereof, at two cents on all railroads of fifty miles or over in length for all intrastate passenger travel in West Virginia. The plaintiff further sought to have said passenger act declared unconstitutional and void so far as it related to its lines of railroad in West Virginia; and also to enjoin said defendants in error from attempting to procure indictments against it for any violation of said passenger act in charging more than two cents per passenger per mile for all intrastate West Virginia travel.

On the 22d day of June, 1909, the defendants in error specially appeared and moved said circuit court to dismiss the plaintiff's bill upon the grounds that it was a suit against the State of West Virginia and prohibited by the constitution (Art. 6, sec. 35,) of that state; and for the further reason that none of the defendants had any personal interest in the cause, (record, p. 23). This motion was overruled, and thereupon a demurrer to the plaintiff's bill was filed by the defendants in error setting up ten specific grounds why said suit should not be maintained, (record, pp. 23-4-5).

This demurrer was also overruled, and thereupon the circuit court of said county, on the 22d day of June, 1909, entered a decree temporarily enjoining the defendants in error from enforcing said passenger act, (record, pp. 20-2).

On the 28th day of June, 1910, the defendants in error filed their joint and separate answer and moved said circuit court to dismiss said preliminary injunction, to the filing of which answer the plaintiff objected and also demurred (record, pp. 42-3-4) both of which were overruled by the court, and the plaintiff announced it did not desire to take proof to maintain its bill. Said circuit court, on said 28th day of June, 1910, entered an order dissolving said injunction, dismissing the cause at the cost of plaintiff, and directed in said order that it take up, redeem and pay the amount due to the respective parties holding the coupons issued by said

railway company under the order of said circuit court entered on the 22d day of June, 1909, (record, pp. 25-7). Thereupon the plaintiff moved a stay of sixty days to procure an appeal to the Supreme Court of Appeals of West Virginia, which stay was granted by said circuit court, and on the 11th day of July, 1910, the plaintiff presented its petition to the Supreme Court of Appeals of West Virginia, (record, pp. 1, 2, 3,) praying for an appeal to the decree of said circuit court entered on the 28th day of June, 1910, which appeal was refused by said supreme court of appeals as shown by an order entered and found on page 1 of the printed record. And thereupon the plaintiff presented its petition to said supreme court of appeals, praying that it grant a writ of error to this Court, which writ of error was granted on said 11th day of July, 1910, as shown by the record pp. 45-51.

**Proceedings in United States Supreme Court.**

The printed record in this cause was filed in this Court on the 30th day of July, 1910, and on the 12th day of December, 1910, counsel for defendants in error moved this Court to dismiss the writ of error or to affirm the judgment or decree below, and filed a brief in support of said motion, which motion was continued until the cause could be heard on its merits. After due notice to the plaintiff in error counsel for defendants in error, on the 27th day of March, 1911, moved this Court to advance the cause, and briefs for and against said motion were filed; and after considering said motion, this Court set the cause for hearing on Monday, the 10th day of October, 1911.

**Explanatory.**

When we say "the plaintiff" in this brief, we mean the plaintiff in error; when we say "the defendants," we mean the defendants in error. When *Italics* are used in quotations, they are ours unless otherwise indicated.

## ARGUMENT AND AUTHORITIES CITED.

**State Has Power to Regulate Intrastate Railroad Rates.**

We take it for granted that the railway company will concede to the state the power to regulate passenger rates so far as such

rates affect intrastate travel. Section 9 of article 11 of the constitution of West Virginia adopted in 1872 provides as follows:

> "Railroads heretofore constructed, or that may hereafter be constructed in this State, are hereby declared public highways and shall be free to all persons for the transportation of their persons and property thereon, under such regulations as shall be prescribed by law; and the Legislature shall, from time to time, pass laws, applicable to all railroad corporations in the State, establishing reasonable maximum rates of charges for the transportation of passengers and freights, and providing for the correction of abuses, the prevention of unjust discriminations between through and local or way freight and passenger tariffs, and for the protection of the just rights of the public, and shall enforce such laws by adequate penalties."

It will be seen the constitution of West Virginia grants such power to the legislature. The highest court of West Virginia confirms that power.

*Railway Company* v. *Transportation Company*, 25 W. Va. 324;

*Coal & Coke Ry. Co.* v. *Conley & Avis*, 67 W. Va. 129.

This Court in numerous decisions has conceded the power to the state legislatures to prescribe reasonable maximum rates on intrastate traffic, whether passenger or freight. It is, therefore, no longer an open question in this Court.

*Munn* v. *Ill.*, 94 U. S. 113 (24 L. ed. 77);

*Stone* v. *Farmers Loan & Trust Co.*, 116 U. S. 307 (29 L. ed. 636);

*Chicago & Grand Trunk R. R. Co.* v. *Wellman*, 143 U. S. 339 (36 L. ed. 176);

*Lehigh Valley R. R. Co.* v. *Penn.*, 145 U. S. 192 (36 L. ed. 672).

**All Statutes Are Presumed to be Constitutional.**

We take it for granted also, that counsel for the railway company will admit this fundamental principle of law: *That all laws passed by any legally constituted legislative body are presumed to be valid.*

We contend that before any court can declare a solemn act of

the legislature unconstitutional and void, it must appear to the court beyond all reasonable doubt that the act is invalid. The "Two Cent Passenger Act" is therefore presumably constitutional.

*Reagin* v. *Farmers Loan & Trust Co.*, 154 U. S. 362 (38 L. ed. 1014);

*Chicago, Milwaukee & St. Paul R. R. Co.* v. *Tompkins*, 176 U. S. 167 (44 L. ed. 417);

*Cotting* v. *Kansas City Stock Yards Co.*, 183 U. S. 79 (46 L. ed. 92).

All doubts must be resolved in favor of the validity of the act complained of.

*Henderson Bridge Co.* v. *Henderson City*, 173 U. S. 624 (43 L. ed. 835);

*Northern Pac. R. R. Co.* v. *North Dakota*, 216 U. S. 579 (54 L. ed. 624).

> "Statutes cannot be declared invalid on the ground that they are unwise, unjust, unreasonable or immoral, or because opposed to public policy or the spirit of the constitution."
>
> 1 Lewis Sutherland Stat. Con. (2d ed.) sec. 85.

The Supreme Court of Appeals of West Virginia in construing the act of the legislature now under consideration, said:

> "Courts will never impute to the legislature intent to contravene the constitution of either the state or the United States, by construing a statute so as to make it unconstitutional, if such construction can be avoided, consistently with law, in giving effect to the statute, and this can always be done, if the purpose of the act is not beyond legislative power in whole or in part, and there is no language in it expressive of specific intent to violate the organic law."
>
> *C. & C. Ry. Co.* v. *Conley & Avis*, 67 W. Va. 129, syl 29.

> "Every statute is presumed to be constitutional. The courts ought not to declare one to be unconstitutional unless it is clearly so. If there is doubt the expressed will of the legislature should be sustained."
>
> *Munn* v. *Ill.*, 94 U. S. 113 (24 L. ed. 77).

Chief Justice Marshall, speaking for the Supreme Court of the United States, in discussing this question, said:

> "The court will not declare a law unconstitutional unless the opposition between the constitution and the law be clear and plain."
>
> *Fletcher* v. *Peck*, 6 Cranch 87 (3 L. ed. 162).

On page 128 of the regular edition, Chief Justice Marshall further said:

> "The question whether a law be void for its repugnancy to the constitution is, at all times, a question of much delicacy, which ought seldom, if ever, to be decided in the affirmative in a doubtful case. The court, when impelled by duty to render such a judgment, would be unworthy of its station, could it be unmindful of the solemn obligations which that station imposes. But it is not on slight implication and vague conjecture that the legislature is to be pronounced to have transcended its powers, and its acts to be considered as void. The opposition between the constitution and the law should be such that the judge feels a clear and strong conviction of their incompatibility with each other."
>
> *Fletcher* v. *Peck*, *supra*.

**Questions of Pleading Raised in State Courts are Finally Settled.**

The questions of pleading raised by the plaintiff and the defendants in the state courts were finally settled when the Supreme Court of Appeals of West Virginia refused to grant the appeal from the decision of the Circuit Court of Kanawha County. The plaintiff presented its petition and a complete transcript of the record in this cause to the state supreme court, and after consideration thereof that court refused the appeal prayed for in the following language (record, p. 1):

> "The court being of opinion that the decree complained of is plainly right."

This action of the highest court of West Virginia is conclusive of the question of procedure in the state courts. Such questions

are local and cannot be raised in and controlled by this Court. It raises no federal question.

*King* v. *West Virginia*, 206 U. S. 92 (54 L. ed. 396);
*Barrington* v. *Mo.*, 205 U. S. 483 (51 L. ed. 890);
*Cornell University* v. *Fiske*, 136 U. S. 152 (34 L. ed. 427);
*Texas & N. O. R. Co.* v. *Miller*, 219 U. S. 591 (55 L. ed. —);
*Kennard* v. *La.*, 92 U. S. 480 (23 L. ed. 478);
*Richmond Min. Co.* v. *Rose*, 114 U. S. 576 (29 L. ed. 273).

The question whether a demurrer to a bill should be sustained, or whether an answer should be filed, or whether a decree entered by a state court is interlocutory or final, is purely a question of general or statutory law, and in nowise raises a federal question under the United States Constitution, its treaties or statutes, and therefore is not subject to review by this Court. Such only relate to matters of practice in the state courts.

*San Francisco* v. *Itsell*, 133 U. S. 65 (33 L. ed. 257);
*Northern Pac. R. R. Co.* v. *Ellis*, 144 U. S. 458 (36 L. ed. 504);
*National Foundry & Pipe Works* v. *Oconto Water Supply Co.*, 183 U. S. 216 (46 L. ed. 157);
*Grand Rapids & I. R. Co.* v. *Butler*, 159 U. S. 87 (40 L. ed. 85);
*Johnson* v. *Drew*, 171 U. S. 93 (43 L. ed. 88);
*Fox* v. *Ohio*, 5 How. 410 (12 L. ed. 213);
*Thornington* v. *Montgomery*, 147 U. S. 490 (37 L. ed. 252);
*Tripp* v. *Santa Rosa Street R. Co.*, 144 U. S. 126 (36 L. ed. 371).

"The legal effect of the judgment set up in bar is a question of general law as to which the decision of the state court is not reviewable here."
*Chouteau* v. *Gibson*, 111 U. S. 201 (28 L. ed. 400).

**Reasons Set Up by Plaintiff Why Statute Is Unconstitutional.**

The railway company in its bill contends, in substance, that

chapter 41 of the Acts of the Legislature of West Virginia of 1907 is unconstitutional and void as to the plaintiff for the following reasons:

1. Because it is confiscatory.
2. Because of the penalties provided therein.
3. Because it interferes with interstate commerce.
4. Because of the classification of railroads.

I will argue these four propositions in the order named above, and in dealing with them I necessarily discuss the "due process of law" and the "equal protection" clause of section 1 of the fourteenth amendment to the federal constitution.

For the convenience of the Court there is printed in the back of this brief, as a supplement, the statute complained of, and also the other statutory provisions in so far as they regulate passenger fares and are considered useful to a determination of this cause.

### The Statute Is Not Confiscatory as to Plaintiff.

The plaintiff in its bill charges that the act complained of confiscates its property and by reason thereof is unconstitutional. The defendants in their answer contend that said act is constitutional in all respects; they deny confiscation, and set out in detail wherein the act complained of is not confiscatory as to the plaintiff. Whether or not the act is confiscatory is a question of fact, or possibly more correctly stated, a mixed question of law and fact. Whether the law was unconstitutional because of confiscation would depend entirely upon the facts. Under the laws of West Virginia the burden of proving confiscation, or the allegation of its bill, was upon the plaintiff. It failed to prove confiscation. It did not even attempt to prove it. In fact, it offered no proof whatever. See printed record, page 26. The state court, when it used the following language (page 26, printed record): "the cause now coming on to be heard upon the constitutional questions raised by the bill," etc., decided this question adversely to the plaintiff, and under the numerous decisions of this Court, the plaintiff is bound by the decision of the state courts on that question.

*King* v. *West Virginia*, 216 U. S. 92 (54 L. ed. 396, syl. 2);

*Waters-Pierce Oil Co.* v. *Texas*, 212 U. S. 86 (53 L. ed. 417);
*Chapman & D. Land Co.* v. *Bigelow*, 206 U. S. 41 (51 L. ed. 953);
*Schlemmer* v. *Buffalo R. P. R. Co.*, 205 U. S. 17 (51 L. ed. 688);
*Chisman* v. *Miller*, 197 U. S. 313 (49 L. ed. 770);
*Western U. Telegraph Co.* v. *Call Pub. Co.*, 181 U. S. 92 (45 L. ed. 765).

"Questions of fact once settled in the courts of the state are not subject to review in the Supreme Court of the United States on writ of error to a state court."
*West. U. Tel. Co.* v. *Call Pub. Co.*, 181 U. S. 92 (45 L. ed. 765, syl. 2).

It has also been decided by this Court that a writ of error can bring up only questions of law. In other words, this Court will not pass upon questions of fact on writ of error. Questions of fact are raised by appeal and not by writ of error. The late Chief Justice Taney, speaking for the Court, said:

"A writ of error can bring up to this Court nothing but questions of law."
*Parks* v. *Turner et al.*, 53 U. S. 12 How. 39 (13 L. ed. 883).

The plaintiff came to this Court by writ of error, and it would seem from the foregoing that this Court can only consider questions of law in this case.

This Court has recognized that a reduction of passenger rates may increase the amount of business, and therefore the amount of earnings. Mr. Justice Brewer, speaking for the Court, in the case of *Chicago & G. T. R. Co.* v. *Wellman*, after considering the facts of the case, said:

"Can it be, under these circumstances, that the court erred in peremptorily refusing to instruct the jury that an Act fixing a maximum rate at two cents per mile is unconstitutional? Is the validity of a law of this nature dependent upon the opinion of two witnesses, however well qualified to testify? Must court and jury accept their opinions as a finality? Must it be declared,

as a matter of law, that a reduction of rates necessarily diminishes income? May it not be possible—indeed, does not all experience suggest the probability—that a reduction of rates will increase the amount of business, and, therefore, the earnings?"

*Chicago & G. T. R. Co.* v. *Wellman*, 143 U. S. 339 (36 L. ed. 176).

This Court will not declare a state statute unconstitutional because it regulates passenger rates and prescribes therein the maximum charge to be made by the railroad companies, until the company affected shows by *"clear and satisfactory evidence"* that the statute operates *unjustly and unreasonably* against it. The plaintiff in this case has failed to offer any proof on any question raised in the pleadings.

Mr. Justice Shiras, speaking for the Court, in the case of *St. Louis & San Francisco Railway Company* v. *Gill*, in discussing the necessity of proof, on pages 666-7 of the official report, said:

"However, we have seen that, in the present case, the evidence failed, in that it was restricted to a part only of the railroad, and that even if the evidence could be understood as applicable to the entire line in Arkansas, there was no finding of the facts necessary to justify the courts in overthrowing the statutory rates as unreasonable, but that, on the contrary, the company's case depended on allegations admitted by the demurrer of a party who, in no adequate sense represented the public; and, upon the whole, we do not feel warranted, by all that appears in this record, in declaring invalid an act of the legislature of Arkansas, which on its face, appears to be a legitimate exercise of power, and which has not been shown, by *clear and satisfactory evidence, to operate unjustly and unreasonably*, in a constitutional sense, against the plaintiff in error."

*St. L. & S. F. R. Co.* v. *Gill*, 156 U. S. 650 (39 L. ed. 567).

In support of the contention of the defendants in this cause that it was incumbent on the plaintiff to satisfy this Court beyond all doubt that the act plainly and palpably operated unjustly against it, which the plaintiff absolutely failed to do, we quote from this Court as follows:

"But it should also be remembered that the judiciary

ought not to interfere with the collection of rates established under legislative sanction unless they are so plainly and palpably unreasonable as to make their enforcement equivalent to the taking of property for public use without such compensation as under all the circumstances is just both to the owner and to the public; that is, judicial interference should never occur unless the case presents, clearly and beyond all doubt, such a flagrant attack upon the rights of property under the guise of regulations as to compel the court to say that the rates prescribed will necessarily have the effect to deny just compensation for private property taken for the public use."

*San D. L. & T. Co.* v. *Nat. City*, 174 U. S. 739 (43 L. ed. 1154).

kind we start with the presumption that the act of the

"In approaching the consideration of a case of this legislature is valid, and upon any company seeking to challenge its validity rests the burden of proving that it infringes the constitutional guaranty of protection to property. The case must be a clear one in behalf of the railroad company or the legislation of the state must be upheld."

*Chicago, M. & St. P. R. Co.* v. *Tompkins*, 176 U. S. 167 (44 L. ed. 417).

To the same effect as the last foregoing case is the case of the *City of Knoxville* v. *Knoxville Water Co.*, 212 U. S. 1 (53 L. ed. 371).

The foregoing citations of authority are only a few of the many decisions of this Court on the question under consideration. This position has been long and well established by this Court. I know of no reason why it would not stand by the cases decided. It would be dangerous to overthrow long settled precedents. The question is certainly *stare decisis*. It seems useless, after a careful consideration of all of the foregoing cited authorities, to further discuss this proposition.

**The Entire Earnings From All Sources Must Be Considered.**

I contend, as heretofore stated, that this Court cannot legally consider the charge of confiscation made by the plaintiff under the statement of pleadings and the statement of facts in this case.

But even if it could consider that question, it is not proper to segregate the passenger earnings from the freight earnings. This would work an injustice to the public. The court ought to consider the entire earnings of the company from all sources from its entire mileage of lines in West Virginia, and charge against such earnings its reasonable and legitimate expenses for the operation of such lines within that state. This would include the pro rata share of the railway company's earnings from bonds held in other companies, from dividends received from stock held in other companies, if any, etc., provided the value of same goes to make up a portion of the value of the railroad company's lines in West Virginia. I also contend that any part of the earnings that was applied to the purchase of additional equipment, extension of its lines, and other improvements must be considered as a part of the net earnings of the company. In passing on an Arkansas statute this Court, at pages 665-6 of the official report, said:

> "It therefore appears that the allegations made and the evidence offered did not cover the company's railroad as an entirety even in the state of Arkansas, but were made in reference to that portion of the road originally belonging to the St. Louis, Arkansas & Texas railway, and extending from the northern boundary of Arkansas to Fayetteville in said state. In this state of facts we agree with the views of the supreme court of Arkansas, as disclosed in the opinion contained in the record, and which were to the effect that the correct test was as to the effect of the act on the defendant's entire line, and not upon that part which was formerly a part of one of the consolidating roads; that the company cannot claim the right to earn a net profit from every mile, section, or other part into which the road might be divided, nor attack as unjust a regulation which fixed a rate at which some such part would be unremunerative; that it would be practically impossible to ascertain in what proportion the several parts should share with others in the expenses and receipts in which they participated; and, finally, that to the extent that the question of injustice is to be determined by the effects of the act upon the earnings of the company, the earnings of the entire line must be estimated as against all its legitimate expenses under the operation of the act within the limits of the state of Arkansas."
>
> *St. Louis, & S. F. R. Co.* v. *Gill*, 156 U. S. 649 (39 L. ed. 567).

"Earnings of a railroad company, applied to the purchase of additional equipment, extension of its lines and other improvements, must be regarded as a part of its net earnings upon an inquiry as to whether a rate statute is confiscatory."

*C. & C. Ry. Co.* v. *Conley & Avis, supra*, syl. 50.

Judge Simonton declared, on the authority of *Smyth* v. *Ames, supra*, that in deciding whether the rates fixed under legislative authority violated the fourteenth amendment to the federal constitution, the courts do not rest their judgment on one set of rates for specific articles, but take into consideration all the rates on all articles, and decide whether as a whole the result is reasonable or unreasonable.

*Matthews* v. *Corporation Com'r*, 106 Fed. Rep. 7.

The Supreme Court of the United States, in passing upon the question of whether a certain rate of freight upon coal in carload lots was unreasonable, because if the same rate were imposed upon all merchandise the road would not pay its operating expenses, on page 1158 of the law edition, said:

"In exercising its power of supervising such rates the commission is not bound to reduce the rates upon *all* classes of freight, which may perhaps be reasonable, except as applied to a particular article; and if, upon examining the tariffs of a certain road, the commission is of opinion that the rate upon a particular article, or class of freight, is disproportionately or unreasonably high, it may reduce such rate, notwithstanding that it may be impossible for the company to determine with mathematical accuracy the cost of transportation of that particular article as distinguished from all others. Obviously such a reduction could not be shown to be unreasonable simply by providing that, if applied to all classes of freight, it would result in an unreasonably low rate."

*Minn. & St. L. R. Co.* v. *Minn.*, 186 U. S. 257 (46 L. ed. 1151).

The Supreme Court of the United States upheld the right of the state of North Carolina to compel the railroad company to run a special train for the convenience of the public, although it entailed some loss to the railroad company.

*Atlantic Coast Line R. Co.* v. *N. C. Corp. Com.*, 206 U. S. 1 (51 L. ed. 933).

My interpretation of the decisions of the Interstate Commerce Commission, in determining the questions affecting the reasonableness of rates of passenger or freight is, that it takes into consideration the entire earnings from passenger and freight traffic. See the following:

*Brabham* v. *Atl. Coast Line R. Co.*, 11 Inters. Com. Rep. 464;
*Comrs.* v. *Eureka Sprs. R. Co.*, 7 Inters. Com. Rep. 69;
*Re Freight Rates*, 11 Inters. Com. Rep. 180;
*Re Rates St. Louis to Texas*, 11 Inters. Com. Rep. 238;
*Re Advances in Freight Rates*, 9 Inters. Com. Rep. 382.

That Commission specifically says:

> "The reasonableness of the passenger fare upon a particular part of the defendant's system, must be determined with reference to the system as a whole."
> *Artz* v. *Seaboard A. L. R. Co.*, 11 Inters. Com. Rep. 458.

We now come to the consideration of the question whether the statute complained of is constitutional because of the penalties provided therein.

**The Statute is Not Unconstitutional Because of the Penalties Provided Therein.**

I earnestly contend that the penalty provision of said "Two Cent Passenger Act" is not now in question. The Supreme Court of Appeals of West Virginia, in my opinion, eliminated that question from this case when it construed said act in the Coal & Coke case. That court said:

> " By the institution of a suit to determine whether such a statute is confiscatory in its operation in a par ticular case, such corporation alters its status from that of a mere corporation, engaged in the public service, to that of a contestant of the legislative claim of right to take its property without due process of law; and, in the absence of expression of intent to the contrary, it is presumed the legislature did not intend to affect, or interfere with, the assumption or maintenance of such status, nor to legislate upon the subject of such remedy; and the penal clause of such a statute, silent on the subject of remedy, has no application, while a suit is pending, in good faith, for the determination of such question." Syl. 26.

"By the application of these rules and principles, a railroad company is excepted from the operation of the penalty clause of chapter 41 of the Acts of 1907, during the prosecution by it, in good faith, of a suit to determine whether said statute is confiscatory in its operation and effect, as applied to such company." Syl 30.

*C. & C. Ry. Co.* v. *Conley & Avis*, 67 W. Va. 129.

It must be remembered that the syllabus of the cases decided by the Supreme Court of Appeals of West Virginia is written by the court and not by the reporter, under a provision of the state constitution requiring it. The constitution provides:

"It shall be the duty of the court to prepare a syllabus of the points adjudicated in each case * * * which shall be prefixed to the published report of the case."

Art. 8, sec. 5, W. Va. Const.

The plaintiff in this case cannot now be heard to complain of the penalty section of said chapter 41. It must be conceded that the state courts have the power to determine the meaning of a state statute, and having such power it carries with it the power to prescribe the extent and limitations of said statute. This Court, on page 455 of the official report, in construing a state statute, in the case of *Smiley* v. *Kansas*, said:

"The power to determine the meaning of a statute carries with it the power to prescribe its extent and limitations, as well as the method by which they shall be determined."

*Smiley* v. *Kansas*, 196 U. S. 447 (49 L. ed. 546).

Is it not incumbent on this Court, in the light of the decision of the state court in the Coal & Coke case in passing upon the same statute now under consideration, and in the light of the decisions of this Court herein above cited, and the numerous other decisions to the same effect, to follow the decision of the state court on this question? I believe it is. Such construction by the state court involves no federal question but is exclusively for the state courts.

*King* v. *West Virginia*, 216 U. S. 92, *supra;*
*Hooker* v. *Los Angeles*, 188 U. S. 314 (47 L. ed. 487);
*Castillo* v. *McConnico*, 168 U. S. 674 (42 L. ed. 622.

**This is Not a Suit to Enforce the Penalties Provided in the Statute.**

It must be remembered that the suit at bar is not a proceeding to enforce the penalty provisions of the law complained of. No recovery of penalties is sought in this case. It is a suit to enjoin certain state and county officers from enforcing chapter 41 of the Acts of the Legislature of West Virginia of 1907. This Court in this case, therefore, will not consider the question of the constitutionality of the penalty clause. In construing the penalty provision of the Hepburn Act of June 29, 1906, this Court in substance said:

> "The Federal Supreme Court will not consider the question of the constitutionality of the clause of the Hepburn act of June 29, 1906, imposing penalties for violations of its provisions forbidding railway carriers from transporting in interstate commerce commodities with which they are associated or in which they are interested, in an action seeking to enforce such provisions by injunction or mandamus, in which no recovery of penalties is sought."
>
> *U. S. ex rel. Atty. Gen.* v. *Del. H. Co.*, 213 U. S. 366 (53 L. ed. 836, syl. 8).

This Court, in the Income Tax Cases, *Flint et al.* v. *Stone Tracy et al.*, decided March 13, 1911, in discussing the penalty clause of the Act of Congress of August 5, 1909, said:

> "And so of the argument that the penalties for the nonpayment of the taxes are so high as to violate the Constitution. No case is presented involving that question, and, moreover, the penalties are clearly a separate part of the act, and whether collectible or not may be determined in a case involving an attempt to enforce them."
>
> *Flint et al.* v. *Stone Tracy et al.*, 220 U. S. 107 (55 L. ed. —).

**Penalty Clause of Statute Does Not Affect Other Provisions Thereof.**

The penalty clause of the statute complained of by the plaintiff cannot affect the validity of the other provisions of said act, even if this Court should not follow the decision of the state supreme court in its construction of said penalty provision. The penalty clause of said "Two Cent Passenger Act" (sec. 2 thereof) is *"wholly separable therefrom."*

"The possible invalidity of the clause of the Hepburn act of June 29, 1906, imposing penalties for violations of its provisions forbidding railway carriers from transporting in interstate commerce commodities with which they are associated, or in which they are interested cannot affect the validity of these provisions, since the penalty clause is wholly separable therefrom."

*U. S. ex rel. Atty. Gen.* v. *Del. H. Co., supra.*, syl. 9.

"If penalties are prescribed in such a statute as a sanction for the due enforcement thereof, and the persons and corporations affected thereby are not expressly or impliedly excepted from the operation of the penal clause, pending such judicial inquiry, and the penalties are so heavy and severe as to expose such persons and corporations to great risk of loss in prosecuting such inquiry, the entire statute is void on its face in so far as it so interferes, unless the penal clause is separable from the rate prescribing clause, *in which case the former only is void to the extent aforesaid.*"

*C. & C. Ry. Co.* v. *Conley & Avis*, 67 W. Va. 129, syl 23.

A statute may be in part constitutional and in part unconstitutional, and if the parts are independent of each other, as in the statute under consideration, that which is constitutional will stand.

*Allen* v. *La.*, 103 U. S. 80 (26 L. ed. 318);
*Marshall Field & Co.* v. *Clark*, 143 U. S. 649 (36 L. ed. 294);
*Baldwin* v. *Franks*, 120 U. S. 678 (30 L. ed. 766);
*Kimmish* v. *Ball*, 129 U. S. 217 (32 L. ed. 695);
*Wilkes County Com'rs* v. *Coler*, 180 U. S. 506 (45 L. ed. 642);
*Eilenbecker* v. *District Court*, 134 U. S. 31 (33 L. ed. 801);
*Florida Cent. R. R. Co.* v. *Schulte*, 103 U. S. 118 (26 L. ed. 327).

**Penalty Clause Not Excessive as Contemplated by the Constitution.**

We contend, however, that even if the constitutionality of the penalty clause of said Passenger Act could be raised in this Court, the same is not excessive as contemplated by the constitution. The constitution of West Virginia specifically authorizes the state legislature to enact laws preventing unjust discriminations as to

freight and passenger traffic, and to enforce such laws by "adequate penalties" (art. 11, sec. 9). The state legislature, in enacting the penalty clause in the act complained of, exercised its constitutional right. That right was sustained by the court of last resort in that state (*Coal & Coke Ry. Co.* v. *Conley & Avis, supra*), and this Court ought not interfere with such constitutional right on *"slight implication and vague conjecture that the legislature is to be pronounced to have transcended its powers, and its acts to be considered as void."*

*Fletcher* v. *Peck*, 6 Cranch 87 (3 L. ed. 162).

The provisions of constitutions against cruel and unusual punishments are generally understood as prohibiting any cruel or degrading punishments not known to the common law, and probably, also, those degrading punishments which had become obsolete when the federal constitution was adopted, and punishments so disproportionate to the offenses as to shock the sense of the community. The penalty clause of the statute complained of does not meet that condition. The Supreme Court of the State of Iowa, on page 341, in dealing with a similar statute to the one now under consideration, said:

> "It is urged that the fines imposed by the statutes for its violation are excessive, and forbidden by section 17, article 1, of the state constitution. The fines are intended to enforce obedience to the law by corporations having great incomes and controlling vast properties. The legislature, in the exercise of its wisdom, fixed penalties which, if imposed upon individuals, might appear excessive, but when imposed upon corporations would be esteemed no greater than is necessary to enforce obedience to the statute. The railroad companies have a ready and efficient way of avoiding these severe penalties, namely, by obeying truly the laws of the state. If they do this, they are in no danger of the penalties; if they do not, they are in no condition to complain of the laws."
>
> *B. C. & N. Ry. Co.* v. *Dey*, 82 Iowa 312.

It has been decided by the Virginia courts that only the minimum penalty is considered when passing upon the constitutionality of the penalties provided by the legislature. That court said:

"The imposition and regulation of fines is within the discretion of the Legislature, and its discretion will not be questioned by the courts except where the *minimum* penalty is so excessive as to shock the sense of mankind."

*Southern Express Co.* v. *Walker*, 92 Va. 59, syl 2.

"When applicable, the penal clause of said chapter" (referring to ch. 41 Acts of the Legislature of West Virginia of 1907) "does not contravene section 5 of article III. of the constitution of this state. The fines thereby imposed are not excessive."

*C. & C. Ry. Co.* v. *Conley & Avis*, 67 W. Va. 129, syl. 31.

The same court in the same case in syllabus 42, said:

"Chapter 41 of the Acts of 1907 is, in all respects, valid on its face."

This construction of the statute is conclusive on this Court as to the constitution of West Virginia. This Court has repeatedly held that it has no power to declare a state statute in violation of a state constitution when the state court has held such law constitutional.

*Jackson exdem. Hart* v. *Lamphire*, 28 U. S. 280 (7 L. ed. 679);

*Osbourne* v. *State of Florida*, 164 U. S. 650 (41 L. ed. 477);

*Hodge et al.* v. *Muscatine County*, 196 U. S. 276 (49 L. ed. 477, syl. 5).

"The conclusion of a state court that a tax is uniform, within the meaning of the requirement of the state constitution, when it is equal upon all persons belonging to the described class on which it is imposed is not open to review upon writ of error from the Supreme Court of the United States to the state court."

*Armour Packing Co.* v. *Lacy*, 200 U. S. 226 (50 L. ed. 451, syl. 5).

**Other Statutory Penalties in West Virginia.**

Below is a brief compilation of the statutory penalties for a few of the offenses punishable in West Virginia, the section numbers refer to the serial sections of Code 1906, unless otherwise indicated.

Any person failing to assist in maintaining order at the polls on election day when commanded by the election commissioners, penalty of not less than $100.00 nor more than $500.00. Sec. 66.

Commissioners and clerks of elections certifying false returns, not less than one nor more than two years in the penitentiary. Sec. 136.

False entries by assessors or clerks, $300.00. Sec. 807.

Selling intoxicating liquors without state license: first offense, not less than $25.00 nor more than $200.00, and not less than two months nor more than six months in the county jail; for second offense, confinement in the penitentiary for one year or in the discretion of the jury, a fine of not over $100.00 and imprisonment in the county jail not less than six nor more than twelve months. Sec. 915.

Sales of intoxicating liquors by druggists, first offense, fine not less than $50.00, nor more than $200.00; second conviction not less than $100.00, nor more than $500.00, and may in the discretion of the court, be imprisoned in the county jail not less than thirty nor more than ninety days, and the court may revoke license to carry on the business of druggist and registered pharmacist. Sec. 917.

Failure of corporations to pay land tax, fine of not less than $25.00 nor more than $500.00 and penalty of 10% of tax. Sec. 1045.

Any person or persons doing business under charter of corporation after proclaimed delinquent by the governor, imprisonment in county jail not exceeding one year, or fine not exceeding $1,000.00, or both. Sec. 1058.

Failure to blow whistle or ring bell of train approaching crossing, not exceeding $100.00. Sec. 2358.

If a president, cashier or director of any state bank receive deposits of money before the certificate of authority to transact business is issued, on conviction they shall be fined not less than $500, and at the discretion of the court imprisoned in jail not less than three nor more than six months. Sec. 2397a1.

For carrying deadly weapons without a state license, imprisonment in jail not less than six nor more than twelve months for first offense, and confinement in penitentiary not less than one nor more than five years for the second offense, and in either case

a fine of not less than $50.00 nor more than $200.00. Ch. 51, Acts Leg. 1909.

Penalties provided for in chapter 41, Acts 1907, the act complained of, not less than $50.00 nor more than $500.00 for each offense.

It will be noted from the foregoing, that the penalties provided in the statute complained of are not as severe as other statutory penalties in West Virginia. In other words, the penalties are not "unusual."

**Penalties in Other States for Similar Offenses.**

Below is a reference to the statutory penalties provided in the following named states for a violation of similar offenses prohibited in said chapter 41, to-wit:

Alabama, for any overcharge by railroads in rates, not less than $100.00, nor more than $10,000.00. Code 1907, sec. 5531. For violation for which no other penalty is provided, not more than $2,000.00, sec. 5557, and in addition to the penalties to the state the railroad company is liable to each person for three times the amount of the damages incurred. Sec. 5559.

Georgia, failure to obey regulations of Railroad Commission, not more than $5,000.00 for each offense. Acts 1907, page 79, sec. 12.

Kansas, refusing to comply with any order of Railroad Commission, $100.00 for each day; also penalty of $100.00 to $5,000.00 to state for school fund. Acts 1901, chap. 286, sections 32-4. Also forfeit three times the damage to any person. Sec. 33.

New York, for violating order of Public Service Commission not more than $5,000.00 for each offense. Public Service Commission Act, sec. 56.

North Dakota, any violation is a misdemeanor and is subject to a fine of not less than $500.00 nor more than $5,000.00 for each offense. Code 1905, sec. 4352. Also three times the amount of damages to any person damaged. Sec. 4349.

Ohio, penalty $50.00. Code 1907-8, sec. 3378.

South Carolina, making any discrimination in freight or passenger rates, not less than $100.00 nor more than $1,000.00. Criminal Code 1902, sec. 477. Failure to obey any order of Railroad Com-

mission, not less than $500.00, nor more than $2,000.00. Civil Code 1902, sec. 2164.

Virginia, violation of rates fixed by Railroad Commission, not less than $50.00, nor more than $200.00 for each offense. Acts 1906, chap. 256, sections 1 and 6.

Nebraska, from $100.00 to $500.00. Laws of Nebraska, 1907, chapter 90, p. 311 *et seq.*

Montana, $500.00 to $5,000.00. Laws of Montana, 1907, chapter 37, p. 68 *et seq.*

Florida, $500.00 to $5,000.00. General Statutes of the State of Florida, 1906, chapter 5, p. 1127 *et seq.*, particularly sec. 2908, p. 1137.

Tennessee, $1,000.00 to $5,000.00. Acts of Tennessee, 1897, chapter 10, p. 113 *et seq.*, particularly sec. 5, p. 116.

Wisconsin, $1,000.00 to $10,000.00. Wisconsin Statutes Supplement Sanborn & Sanborn's Annotations, 1899-1906, chapter 87, p. 887 *et seq.*

Iowa, $1,000.00 to $10,000.00. Code of Iowa, annotated, 1897, sec. 2147, p. 764.

Minnesota, for violation freight rates: first offense, $2,500.00 to $5,000.00; each subsequent offense, $5,000.00 to $10,000.00. For violation of passenger rates, fine not exceeding $5,000.00, or imprisonment or both for each offense.

**Penalties Provided in Federal Statutes More Severe Than Penalty Provided in Statute Under Consideration.**

The federal statutes fixing the penalties for violation of federal laws are much more severe than penalties provided in the statute complained of. For instance, the anti-pass law provides that a person found guilty of violating the same shall be fined not less than $100.00 nor more than $2,000.00 for each offense; see Supplement to Federal Statutes Annotated, 1909, p. 257. The Interstate Commerce Act provides, for a discrimination in passenger rates, etc., a penalty not to exceed $5,000.00 for each offense, and under certain conditions, in addition to said fine, imprisonment in the penitentiary for a term not exceeding two years, or both said fine and imprisonment in the descretion of the court; see section 10 of Interstate Commerce Act, 3 Fed. Stat. Anno. 835; and in

addition to the fine and imprisonment there is also a civil penalty or remedy; see section 9 of said Interstate Commerce Act, 3 Fed. Stat. Anno. 833. See also penalties for violation of postal laws and counterfeiting laws which are largely in excess of the penalties provided in the statute involved in this suit.

The Act of August 5, 1909, the special excise tax on corporate incomes, provides a penalty of "not less than $1,000.00 and not exceeding $10,000.00."

See *Flint* v. *Stone Tracy Co.*, 220 U. S. 107 (55 L. ed. —).

**The Eighth Amendment to the Federal Constitution Does Not Apply to State Legislatures and State Courts.**

The eighth amendment to the federal constitution, among other things, provides:

> "Excessive bail shall not be required, nor excessive fines imposed, nor cruel nor unusual punishments inflicted."

This amendment does not apply to the state courts and state legislatures. It is a limitation on the discretion of the federal courts and on congress.

*Ohio* v. *Dollison*, 194 U. S. 445 (48 L. ed. 1062);
*Bolln* v. *Neb.*, 176 U. S. 83 (44 L. ed. 382);
*Fox* v. *Ohio*, 46 U. S. 5 How. 411 (12 L. ed. 213).

In fact, the first ten amendments to the federal constitution were intended to operate on the national government alone, and were not intended to limit the powers of state governments in respect to their own people.

*Ex parte Spies*, 123 U. S. 131 (31 L. ed. 80);
*McElvaine* v. *Brush*, 142 U. S. 155 (35 L. ed. 971).

The discretion of the federal courts and the federal congress is therefore circumscribed within the same limits as to excessive fines and cruel and unusual punishments, as the state legislatures and the state courts. If the state statute now under consideration inflicts excessive penalties and is thereby unconstitutional, then numerous federal statutes are unconstitutional for the same reason. See statutes hereinabove referred to. But I contend it is not within the power of the federal courts to say whether the fines

imposed are excessive or the punishments inflicted are cruel and unusual when imposed and inflicted by state statutes and enforced in state courts. The eighth amendment to the federal constitution has no application to the punishment of crimes against the laws of a state.

*Ex parte Watkins*, 32 U. S. 7 Pet. 568 (8 L. ed. 786).

Said amendment is not a restraint upon and does not apply to the legislature and the courts of a state, but applies only to congress and the federal courts.

*Pervear* v. *Mass.*, 72 U. S. 5 Wall. 497 (18 L. ed. 607);
*O' Neil* v. *Vt.*, 144 U. S. 323 (36 L. ed. 450).

**Chapter 41 Acts of the Legislature of 1907 Does Not Interfere With Interstate Commerce as Contemplated by the Federal Constitution and the Decisions of the Supreme Court of the United States.**

Chapter 41, Acts of the Legislature of 1907 does not attempt to regulate interstate passenger rates. It prescribes a maximum rate for intrastate fares only. The title of said chapter shows the intention of the legislature as well as the phraseology of the statute itself. The title is as follows:

> "An Act relating to and regulating passenger rates upon railroads in the state of West Virginia and prescribing penalties for the violation thereof."

Section 1 also, in part, provides:

> "That all railroad corporations organized or doing business in this state under the laws or authority thereof," etc.

It is plain to be seen from the title to said statute and from the statute itself that it does not attempt to regulate, in any manner, interstate commerce. It deals only with intrastate passenger traffic. It does not regulate the fare of a passenger coming from some point in another state to a point in West Virginia. It does not regulate the fare of a passenger going from a point in West Virginia to a point in another state or territory. It does not regulate the fare of passengers coming from another state through West Virginia to another state. It only regulates the passenger fares

from a point in West Virginia to another point in West Virginia, the distance traveled being within West Virginia. The plaintiff construed the statute as relating solely to intrastate passenger traffic during the time it observed the law. The general traveling public throughout West Virginia, all officers whose duty it was to enforce the law, and all other railroads to which the law applied, construed it as applying solely to intrastate passenger traffic. The Supreme Court of Appeals of West Virginia construed the law in the same manner.

*Coal & Coke Ry. Co.* v. *Conley & Avis, supra.*

The statute therefore does not operate on interstate commerce within the federal constitutional prohibition. If it operates on interstate commerce at all, it is merely incidental. This Court has many times held that state legislation, in a variety of ways, may affect interstate commerce and the persons and corporations engaged in it, without constituting a regulation of interstate commerce within the constitutional prohibition. Mr. Justice Day, in speaking for the Court in the case of the *Pennsylvania Railroad Company* v. *Hughes*, on page 488 of the official report, in part, said:

> "It is well settled that the state may make valid enactments in the exercise of its legislative power to promote the welfare and convenience of its citizens, although in their operation they may have an effect upon interstate traffic."
>
> *Pa. R. R. Co.* v. *Hughes*, 191 U. S. 477 (48 L. ed. 268).

Mr. Justice Harlan, after a review of the cases decided in this Court on this subject, speaking for the Court on page 635 of the official report in the case of *Missouri K. & T. R. Co.* v. *Haber*, said:

> "These cases all proceed upon the ground that the regulation of the enjoyment of the relative rights, and the performance of the duties, of all persons within the jurisdiction of a state belong primarily to such state under its reserved power to provide for the safety of all persons and property within its limits; and that even if the subject of such regulations be one that may be taken under the exclusive control of congress, and be reached by national legislation, any action taken by the

state upon that subject that does not directly interfere with rights secured by the Constitution of the United States or by some valid act of Congress must be respected until Congress intervenes."

*Mo. K. & T. R. Co.* v. *Haber,* 169 U. S. 613 (42 L. ed. 878).

The late Mr. Justice Peckham, in the case of the *Western Union Telegraph Company* v. *James,* on page 656 of the official report, said:

"It has been held that it is not every enactment which may incidentally affect commerce and persons engaged in it that necessarily constitutes a regulation of commerce within the meaning of the constitution."

*Western U. Tel. Co.* v. *James,* 162 U. S. 650 (40 L. ed. 1105).

The following cases, in my opinion, sustain that contention:

*Sherlock* v. *Alling,* 93 U. S. 99 (23 L. ed. 819);
*Phila. & R. R. Co.* v. *Penn.,* 82 U. S. 283 (21 L. ed. 164);
*Mobile County* v. *Kimball,* 102 U. S. 586 (26 L. ed. 238);
*Smith* v. *Ala.,* 128 U. S. 465 (31 L. ed. 508);
1 Intrs. Com. Rep., 804.

**Power to Enact Statute Comes Within Police Power of State.**

The power exercised by the legislature of West Virginia in enacting the statute complained of clearly comes under the police power of the state. It is clear, as we have heretofore shown in this brief, that the legislature had the constitutional right to enact the law. This Court, in construing an Ohio statute on page 297 in the case of *Lake Shore & M. S. R. Co.* v. *Ohio,* said:

"But in our opinion, the power, whether called police, governmental, or legislative, exists in each state, by appropriate enactments not forbidden by its own constitution or by the constitution of the United States, to regulate the relative rights and duties of all persons and corporations within its jurisdiction, and therefore to provide for the public convenience and the public good."

*Lakeshore & M. S. R. R. Co.* v. *Ohio,* 173 U. S. 285 (43 L. ed. 702).

This case was cited with approval in the case of the *Western Union Telegraph Company* v. *Commercial Milling Company,* reported in 218 U. S. 233 (54 L. ed. 1088).

The Legislature of the State of Michigan (Act 195, Pub. Acts 1893, sec. 1) made it the duty of all telephone companies incorporated either within or without that state, but doing business within that state, to receive dispatches from and for the lines of other telephone companies and from and for any individuals, and to transmit such telegrams impartially and in good faith; and provided that the telephone company should be liable for any mistakes, errors or delays in transmission or delivery, or the failure to deliver any message. The Western Union Telegraph Company contended that said act interfered with interstate commerce, but this Court decided otherwise in the case of the *Western Union Telegraph Company* v. *Commercial Milling Company, supra.* This Court has also held, in passing upon a similar statute enacted by the Legislature of Georgia, that such a statute did not interfere with interstate commerce, even when applied to interstate messages, in the absence of any legislation by Congress on the subject.

*Western Union Telegraph Co.* v. *James,* 162 U. S. 650 (40 L. ed. 1105).

It is plain, from an examination of the statute complained of (chapter 41 Acts of the Legislature of West Virginia of 1907) that it does not in terms embrace interstate traffic. It therefore was not intended to and does not directly interfere with interstate commerce. The plaintiff does not show such interference. The burden was on the plaintiff to prove beyond a reasonable doubt direct interference. In construing a Kentucky statute relating to long and short distance hauls, this Court, on page 518, said:

> "It is plain that the provision in question does not in terms embrace the case of interstate traffic. It is restricted in its regulation to those who own or operate a railroad within the state, and the long and short distances mentioned are evidently distances upon the railroad line within the state. The particular case before us is one involving only the transportation of coal from one point in the state of Kentucky to another by a corporation of that state.
>
> "It may be that the enforcement of the state regula-

tion forbidding discrimination in rates in the case of articles of a like kind carried for different distances over the same line may somewhat affect commerce generally; but we have frequently held that such a result is *too remote and indirect* to be regarded as an interference with interstate commerce; that the interference with the commercial power of the general government, to be unlawful, must be direct, and not the merely incidental effect of enforcing the police powers of a state."

*Louisville & N. R. Co.* v. *Kentucky*, 183 U. S. 503 (46 L. ed. 306).

The following authorities are cited to sustain the foregoing position:

*New York, L. E. & W. R. Co.* v. *Penn.*, 158 U. S. 431 (39 L. ed. 1043);
*Henderson Bridge Co.* v. *Ky.*, 166 U. S. 150 (41 L. ed. 953).

One of the objections made by the plaintiff to the statute complained of is, that the West Virginia intrastate rate is lower than the interstate rate. This contention, however, is not correct. The legal charge for intrastate West Virginia passenger fare is two cents per passenger per mile, while the average charge per passenger per mile made by the plaintiff over its entire system for the year ending June 30, 1908, was only 1.786 cents, as is shown on page 16 of the thirtieth annual report of the board of directors to the stockholders of the railway company (printed record, p. 30). The annual reports of said board of directors to the stockholders for the years ending June 30, 1909, and June 30, 1910, show also that the average interstate charge per passenger per mile does not exceed two cents; but, conceding for the sake of argument only, that the intrastate West Virginia passenger charge as fixed by the statute was less than the amount charged by the plaintiff for interstate passenger travel, we contend that such a state of facts would not affect the legality of the statute. If this were the law, then the plaintiff could, at its pleasure, reduce its interstate rate lower than the rate charged for intrastate business, and thereby have a state statute declared unconstitutional by the courts. All state legislation regulating charges for intrastate business made by any person or corporation doing an interstate business would thereby

be a farce. Such a holding by the courts would create a strange condition in this country with our dual system of government. It would deprive the states of their constitutional rights—of their reserved powers. It would be an assumption of power on the part of the courts, in my opinion, not warranted by the constitution or any inherent power within the courts. The Interstate Commerce Commission met this proposition squarely and determined it against the railway company's contention. That Commission, in the year 1909, held that the use of local state rates may legally yield a lower charge than a through interstate rate. In the case of *Kuntz* v. *Pennsylvania Company et al.*, the Commission said:

> "Let us assume that the through rate from Charleston to Savannah established by the Atlantic coast Line was $6, while the rate from Charleston to the State line was $3, and from the state line to Savannah $2. It is apparent that if a passenger applied to the Railroad company at Charleston for a ticket to Savannah, that company must sell him a through ticket for $6, and would have no right to sell two local tickets for $5; for that would be an evasion of its published tariff rates. Upon the other hand, this Commission has stated in its administrative rulings, and now repeats, that the passenger may properly pay his fare from Charleston to the State line and again from the State line to Savanah, although he thereby obtains through transportation between these points for less than the published through rate, and although he does so, knowing that he is to go from Charleston to Savannah, and deliberately seeking this means of obtaining transportation at less than the through rate.
>
> "The reason for this is that not the intent of the parties but the actual transaction must be regarded, as we held by the United States Supreme Court in *Gulf, Colorado & Santa Fe Ry. Co.* v. *Texas*, involving the transportation of a carload of grain from a point in North Dakota to a point in Texas, at a rate from the point of origin to Texarkana and a rate from Texarkana to destination, which, when combined, were less than the through rate. The Charleston & Savannah Railroad Co. sells to all the world tickets from Charleston to the State line for $3, and again from the State line to Savannah for $2. A passenger may purchase his ticket to the State line, and when he arrives there that contract of

transportation is at an end. He now purchases another ticket from the State line to Savannah and a new contract of transportation begins. If the regulations of the railroad company permit it, he may, instead of purchasing a ticket, pay his cash fare upon the train, to the same effect. He has, indeed, secured through transportation for less than the through rate; but he has done so by putting together two local transportations at the local rates.

"Congress might undoubtedly say that this shall not be done, but up to the present time has not so declared."
*Kurtz* v. *Pa. Co. et al.*, 16 I. C. C. R. 410.

Mr. Justice Brewer, sitting as a circuit judge, in the case of *Ames* v. *Union Pacific Ry. Co.*, said:

"It is true that the companies may for their own convenience, to secure business, or for any other reason, rearrange their interstate rates and make them conform to the local rates prescribed by the statute, but surely there is no legal compulsion. The statute of the state does not work a change in interstate rates any more than an act of Congress prescribing interstate rates would legally work a change in local rates. *Railroad companies cannot plead their own convenience, or the effect of competition between themselves and other companies, in restraint of the otherwise undeniable power of the state.*"
*Ames* v. *Union Pac. R. R. Co.*, 64 Fed. Rep. 171.

**Statute Places No Burden on Interstate Commerce.**

The statute complained of places no burden upon, and does not interfere with, interstate commerce. It deals only with intrastate business. So far as the statute is concerned the plaintiff is free to conduct its interstate business without paying the slightest attention to the terms of the statute. The statute regulating the passenger charge for its intrastate passenger traffic is at most a mere incident to its interstate business, and therefore furnishes no obstacle to the regulation and operation of its interstate business. Under these conditions this Court says it has never held that such a state statute is unconstitutional.

*Osbourne* v. *Fla.*, 164 U. S. 650 (41 L. ed. 586).

The Supreme Court of Appeals of West Virginia held, in the case of the *Coal & Coke Ry. Co.* v. *Conley & Avis, supra,* that the statute complained of does not interfere with interstate commerce. In the case at bar it adhered to that holding when it refused to grant the plaintiff an appeal to that court. The holding of a state court that a state statute does not apply to or interfere with interstate commerce is conclusive on and will be followed by the federal courts.

> "The construction by a state court of a state license statute, holding that it does not apply to the interstate business of an express company will be followed by the federal courts."
>
> *Osbourne* v. *Fla.,* 164 U. S. 650 (41 L. ed. 586, syl. 1).

To the same effect are the following cases:

*Kehrer* v. *Stuart,* 197 U. S. 60 (49 L. ed. 663);

*Standard Oil Co. of Ky.* v. *Tenn.,* 217 U. S. 413 (54 L. ed. 817);

*Southwestern Oil Co.* v. *Texas,* 217 U. S. 114 (54 L. ed. 688).

**Incumbent on Plaintiff to Prove Interference With Interstate Commerce.**

The statute complained of, as we have heretofore seen, does not on its face attempt to regulate, or in any manner interfere with, interstate commerce. Whether it does or does not interfere with interstate commerce is therefore determined from the facts. The plaintiff contends that the statute does interfere with interstate commerce. The defendants in their answer deny such allegations in the plaintiff's bill. The burden of proof, therefore, was upon the plaintiff. It offered no proof on that subject. It absolutely failed to prove its allegation. The state courts decided that question against the plaintiff, and such decision is conclusive on this Court.

This Court, on page 103 of the official report, said:

> "Questions of fact, as has been repeatedly held, when once settled in the courts of a state, are not subject to review in this Court."
>
> *West. U. Tel. Co.* v. *Call Pub. Co.,* 181 U. S. 92 (45 L. ed. 765).

To the same effect are the following cases:

*King* v. *West Virginia*, 216 U. S. 92 (54 L. ed. 396, syl. 2);
*Waters-Pierce Oil Co.* v. *Tex.*, 212 U. S. 86 (53 L. ed. 417);
*Chapman & D. Land Co.* v. *Bigelow*, 206 U. S. 41 (51 L. ed. 953);
*Dower* v. *Richards*, 151 U. S. 658 (38 L. ed. 305);
*Egan* v. *Hart*, 165 U. S. 188 (41 L. ed. 680);
*Chicago, R. & Q. R. Co.* v. *Chicago*, 166 U. S. 266 (41 L. ed. 979);
*Hedrick* v. *Atchison, T. & S. F. Co.*, 167 U. S. 673 (42 L. ed. 320);
*Gardner* v. *Bonestell*, 180 U. S. 362 (45 L. ed. 574).

**Congress Cannot Regulate Intrastate Commerce.**

The federal government does not have the legal right to regulate and interfere with the intrastate commerce of a state. The commercial clause of the federal constitution (art. 1, sec 8) does not confer on congress the right to regulate or in any manner to directly interfere with the internal commerce of the states. It is one of the rights the states wisely reserved to themselves.

*Gibbons* v. *Ogden*, 22 U. S. 1 (6 L. ed. 23);
*Conway* v. *Taylor*, 66 U. S. 603 (17 L. ed. 191);
*Pensacola Tel. Co.* v. *West. U. Tel. Co.*, 96 U. S. 1 (24 L. ed. 708).

The Supreme Court of the United States, so far as our investigation of the decisions discloses, has never held that state laws prescribing the maximum charges for passenger traffic wholly within the state were violative of the commerce clause of the federal constitution. When such rates have been held invalid it was upon the ground that property was taken without "due process of law." Interstate commerce and intrastate commerce are controlled and regulated by two separate and distinct sovereignties. This Court has held, through its present Chief Justice, an act of congress unconstitutional because it interfered with intrastate commerce.

*Howard* v. *Ill. C. R. Co.*, 207 U. S. 463 (52 L. ed. 297).

**Two Sovereign Powers in Each State—State and Federal.**

It is true we have two sovereign powers constantly in operation in the states—the state power and the federal power—the two together constituting a complete government. But the rights of each of these sovereign powers are separate and distinct as to commerce. The powers exercised by the state government are local or domstic in their application, while the powers exercised by the federal government are those which affect the people of all the states alike. *Cardwell* v. *Bridge Co.*, 113 U. S. 210 (28 L. ed. 959). The extent of the jurisdiction of these two sovereign powers was firmly fixed by the people of the United States in the adoption of the federal constitution. The federal government has the exclusive legal right to exercise control over interstate commerce, while the states have the exclusive legal right to exercise control over intrastate commerce, the latter being the reserved and inherent police power of the states.

*Coffee* v. *Groover*, 123 U. S. 1 (31 L. ed. 51).

The power and authority of each sovereignty is exclusive within its jurisdiction. This has been repeatedly held by this Court.

*Covington & Cin. Bridge Co.* v. *Ky.*, 154 U. S. 204 (38 L. ed. 962);
*Howard* v. *Ill. Cen. R. R. Co.*, 207 U. S. 463 (52 L. ed. 297);
*U. S.* v. *DeWitt*, 76 U. S. 41 (19 L. ed. 593);
*Patterson* v. *Ky.*, 97 U. S. 501 (24 L. ed. 1115).

This Court said on page 470 of the official report:

> "Over this" (the internal) "commerce and trade, Congress has no power of regulation nor any direct control. This power belongs exclusively to the states. No interference by Congress with the business of citizens transacted within a state is warranted by the constitution, except such as is strictly incidental to the exercise of powers clearly granted to the legislature. The power to authorize a business within a state is plainly repugnant to the exclusive power of the state over the same subject."
>
> *Illinois Tax Cases*, 72 U. S. 462 (18 L. ed. 497).

For the convenience of the Court I quote from the decisions of

this Court, in support of the foregoing principles, the following: In the case of *Covington & Cincinnati Bridge Co.* v. *Kentucky*, 154 U. S., *supra*, at page 209, this Court said:

> "The adjudications of this Court, with respect to power of the state over the general subject of commerce are divisible into three classes. First, those in which the power of the state is exclusive; second, those in which the states may act in the absence of legislation by Congress; third, those in which the action of Congress is exclusive and the states cannot interfere at all.
>
> "The first class, including all those wherein the states have plenary power, and Congress has no right to interfere, concern the strictly internal commerce of the state, and while the regulations of the state may affect interstate commerce indirectly, their bearing upon it is so remote that it cannot be termed in any just sense an interference. Under this power, the states may authorize the construction of highways, turnpikes, railways and canals between points in the same state and regulate the tolls for the use of the same."

In the same opinion, on page 213 of the official report, this Court said:

> "The question of the power of the states to lay down a scale of charges, as distinguished from their power to impose taxes, was first squarely presented to the Court in *Munn* v. *Illinois*, 94 U. S. 113, in which a power was conceded to the state to prescribe regulations and fix the charges of elevators used for the reception, storage, and delivery of grain, notwithstanding such elevators were used for the storage of grain destined for other states."

In passing upon the rights of the states to establish reasonable maximum rates for the transportation of freight and passengers within a state, in the same opinion, on page 214 of the official report, this Court said:

> "In the next case, namely, that of the *Chicago, Burlington & Quincy Railroad* v. *Iowa*, 94 U. S. 155, 163, a bill was filed by the Chicago, Burlington & Quincy R. R. Co., an Illinois corporation, to restrain the prosecution of suits against it under 'an act to establish reasonable maximum rates of charges for the transporta-

tion of freight and passengers on the different railroads of this state.' The complainant was also the lessee of the Burlington & Missouri Railroad in Iowa, the two roads being connected by a bridge which crossed the Mississippi river at Burlington, thus making a continuous railroad from Chicago to Platsmouth on the Mississippi river, in Iowa. The case was held to be covered by *Munn* v. *Illinois*, the road, like the warehouse in that case, being situated within the limits of a single state. 'Its business,' said the chief justice, 'is carried on there, and its regulation is a matter of domestic concern'."

In the case of *Stone* v. *Farmers Loan & Trust Co.*, on page 334, this Court said:

> "It may, beyond all question, by the settled rule of decision in this Court, regulate freights and fares for business done exclusively within the state, and it would seem to be a matter of domestic concern to prevent the company from discriminating against persons and places in Mississippi."
>
> *Stone* v. *Farmers Loan & Trust Co.*, 116 U. S. 307 (29 L. ed. 636).

**Federal Interstate Commerce Act Relates Only to Interstate Commerce.**

We have seen from the decisions of thic Court that Congress cannot legislate for the states. It is therefore clear that the provisions of the federal interstate commerce act forbidding discriminations between localities, etc., relate only to discriminations in interstate commerce, and do not and could not relate to discriminations between localities, etc., as to intrastate traffic. The state having the reserved and inherent power over its own domestic commerce, that power cannot be directly limited or affected by any federal law. If the contention of the plaintiff is correct, that intrastate rates to any given point must be the same as interstate rates to competing points outside the state, then the state possesses no internal commerce power over persons and corporations doing an interstate business, and the decisions of this Court heretofore on that subject are all wrong and the federal constitution is meaningless. But this Court has very recently held that a state can prescribe reasonable maximum rates on intrastate traffic.

*Northern Pac. Ry. Co.* v. *N. D.*, 216 U. S. 579 (54 L. ed. 624).

In sustaining section 218 of the constitution of the state of Kentucky prohibiting a greater charge for a shorter than for a longer haul within the state, and in holding that such a provision by reason of its remote and indirect effect was not an interference with interstate commerce, this Court, on page 518, said:

> "The final contention, that section 218 of the Constitution of Kentucky operates as an interference with interstate commerce, and is therefore void need not detain us long.
>
> "It is plain that the provision in question does not in terms embrace the case of interstate traffic. It is restricted in its regulation to those who own or operate a railroad within the state, and the long and short distances mentioned are evidently distances upon the railroad lying within the state. The particular case before us is one involving only the transportation of coal from one point in the state of Kentucky to another by a corporation of that state.
>
> "It may be that the enforcement of the state regulation forbidding discrimination of rates in the case of articles of a like kind carried for different distances over the same line may somewhat affect commerce generally; but we have frequently held that such a *result is too remote and indirect to be regarded as an interference with interstate commerce;* that the interference with the commercial power of the general government, to be unlawful, must be direct, and not the merely incidental effect of enforcing the police powers of a state."
>
> *L. & N. R. R. Co.* v. *Ky.*, 183 U. S. 503 (46 L. ed. 298).

See also the case of *New York ex rel* v. *Hasterberg*, 211 U. S. 31 (53 L. ed. 75).

> "The interference with the commercial power must be direct, and not the mere incidental effect of the requirement of the usual proportional contribution to public maintenance."
>
> *N. Y., Lake E. & Western R. R. Co.* v. *Penn.*, 158 U. S. 431 (39 L. ed. 143).

In the same opinion, on page 437 of the official report, in discussing a franchise tax statute, this Court further said:

> • • • "We have frequently had occasion to show

that the existence of federal supervision over interstate commerce and the consequent obligation upon the federal courts to protect that right of control from encroachment on the part of the states, are not inconsistent with the power of each state to control its own internal commerce." * * * *

**Interstate Roads Are Subject to State Regulation as to Intrastate Commerce.**

The question arose in the case of *Reagin* v. *Mercantile Trust Co.* whether the Texas & Pacific Railway Company, a corporation organized under an Act of Congress, was subject to the laws of Texas regulating the charges for transportation wholly within that state. On page 416 of the official report, this Court said:

"By the act of incorporation Congress authorized the company to build its road through the state of Texas. It knew that, when constructed, a part of its business would be the carrying of persons and property from points within the state to other points also within the state, and that in so doing it would be engaged in a business, control of which is nowhere by the federal constitution given to Congress. * * * We are of the opinion that the Texas & Pacific Ry. Co. is, as to business done wholly within the state, subject to the control of the state in all matters of taxation, rates and other police regulations."

*Reagin* v. *Mercantile T. Co.*, 154 U. S. 413 (38 L. ed. 1028).

In construing a Nebraska statute, on page 522 of the official report in the case of *Smyth* v. *Ames*, this Court said:

"It cannot be doubted that the making of rates for transportation by railroad corporations along public highways, between points wholly within the limits of a state, is a subject primarily within the control of the state." * * * *

"The question of rates for wholly local business was left under the control of the respective states through which the Union Pacific Railroad might pass. * * * We do not think that the national character of the corporation constructing the Union Pacific Railroad stands in the way of a state prescribing rates for transporting

property on that road wholly between points within its territory."

*Smyth* v. *Ames*, 169 U. S. 466 (42 L. ed. 819).

In construing a Texas statute providing penalties for failure to furnish cars to shippers, in case of *Houston & Texas Central Railway Co.* v. *Mayes*, on page 328 of the official report, this Court said:

> "As the power to build and operate railways, and to acquire land by condemnation, usually rests upon state authorities, the legislatures may annex such conditions as they please with regard to intrastate transportation and such other rules regarding interstate commerce as are not inconsistent with the general right of such commerce to be free and unobstructed."
>
> *Houston & Texas Cen. Ry. Co.* v. *Mayes*, 201 U. S. 319 (50 L. ed. 772).

This Court, through the present Chief Justice, in the case of *Howard* v. *Illinois Central Railroad Co.*, page 502 of the official report, in discussing the constitutionality of the federal employers' liability law, said:

> "It assumes that, because one engages in interstate commerce, he thereby endows Congress with power not delegated to it by the constitution; in other words, with the right to legislate concerning matters of purely state concern. It rests upon the conception that the constitution destroyed that freedom of commerce which it was its purpose to preserve, since it treats the right to eagage in interstate commerce as a privilege which cannot be availed of except upon such conditions as Congress may prescribe, even although the conditions would be otherwise beyond the power of Congress. It is apparent that if the contention were well founded it would extend the power of Congress to every conceivable subject, however inherently local, would obliterate all the limitations of power imposed by the constitution, and would destroy the authority of the states as to all conceivable matters, which from the beginning, have been, and must continue to be, under their control so long as the constitution endures."
>
> *Howard* v. *Ill. Cen. R. R. Co.*, 207 U. S. 463 (52 L. ed. 297).

**Lowering of Intrastate Rates Does Not Affect Interstate Rates.**

The lowering of intrastate transportation rates by a state statute works no legal compulsion on the plaintiff to change its interstate rates. The plaintiff cannot plead its own convenience or business reasons in restraint of the undeniable power of the state to regulate its internal commerce. This Court, at page 295, said:

> "The internal commerce of a state—that is, the commerce which is wholly confined within its limits—is as much under its control as foreign or interstate commerce is under the control of the general government."
>
> *Sands* v. *Manistee R. Imp. Co.*, 123 U. S. 288 (31 L. ed. 149).

I interpret the following cases to the same effect as the case of *Sands* v. *Manistee River Improvement Co., supra:*

*Louisville, New Orleans & T. Ry. Co.* v. *Miss.*, 133 U. S. 587 (33 L. ed. 784); *Geer* v. *Com'r.*, 161 U. S. 519 (40 L. ed. 793); *Louisville & N. R. Co.* v. *Ky.*, 161 U. S. 677 (40 L. ed. 849).

The present Chief Justice of this Court, at page 19, in the case of *Atlantic Coast Line Railroad Company* v. *North Carolina Corporation Commission*, in speaking of the elementary proposition that all railroads from their public nature were subject to state regulation, said:

> "The elementary proposition that railroads, from the public nature of the business by them carried on, and the interest which the public has in their operation, are subject, as to their state business, to state regulations, which may be exerted either directly by the legislative authority or by administrative bodies endowed with power to that end, is not and could not be successfully questioned, in view of the long line of authorities sustaining that doctrine."
>
> *Atlantic Coast Line R. R. Co.* v. *N. Carolina Cor. Com.*, 206 U. S. 1 (51 L. ed 933).

See citation of authorities in note at page 942 of the lawyers' edition.

The plaintiff, in the state courts, contended that the statute complained of operated as a burden upon the plaintiff's interstate business. The defendants contend that the statute did not so

operate. The statute on its face clearly does not attempt to regulate or interfere with interstate commerce. The plaintiff did not sufficiently show, by proof or otherwise, that the statute directly interfered with its interstate commerce. This Court has very recently settled that proposition of law in favor of the defendants. The Court, at page 283, in part, said:

> "To support this proposition it is urged that the charter of the interstate railroad company, the builder of the branch, provided for a road not only in Kansas, but to extend into Texas and Missouri, and, therefore, an interstate railroad. This being its character, the argument proceeds to assert that the regulation of traffic on the road, whatever be the nature of the traffic, was interstate commerce, and beyond the control of the state of Kansas. But this simply confounds the distinction between state control over local traffic and federal control over interstate traffic. *To sustain the proposition would require it to be held that the local traffic of the road was free from all governmental regulation, unless, at the same time, it were held that the incorporation of the road had operated to extend the powers of the government of the United States to subjects which could not come within the authority of that government consistently with the constitution of the United States. Manifestly, the mere fact that the charter of the road contemplated that it should be projected into several states did not change the nature and character of our constitutional system, and, therefore, did not destroy the power of Kansas over its domestic commerce, or operate to bring under the sway of the United States matters of local concern and of course could not project the authority of Kansas beyond its own jurisdiction.* The charter therefore left the road for which it provided subject, as to its purely local or state business, to the authority of the respective states into which it was contemplated the road should go, and submitted the road as an entirety, so far as its interstate commerce business was concerned, to the controlling power conferred by the constitution upon the government of the United States.
>
> * * * * * * * * * * * * *
>
> "The order cannot be said to be an unreasonable exertion of authority, because the power manifested was made operative to the limit of the right to do so. * * * It is said that, as the state line may be but a mere corn-

field, and great expense must result to the railway to establish necessary terminal facilities in such a place, it must follow that the road, in order to avoid the useless expense, must operate the passenger service directly by the order, not only to the state line, but twenty miles beyond, to Butler, on the Joplin line, where terminal facilities exist. * * * * But under the hypothesis upon which the contention rests, the operation of the train to Butler would be at the mere election of the corporation, and besides, even if the performance of the duty of furnishing adequate local facilities in some respects affected interstate commerce, it does not necessarily result that thereby a *direct burden* on interstate commerce would be imposed."

*Mo. Pac. Ry. Co.* v. *Kan., etc.*, 216 U. S. 262 (54 L. ed. 472).

It is conclusively settled from the foregoing decisions, that the states have the exclusive right to regulate and control their own internal commerce. It is equally settled that if the states, in regulating and controlling such commerce, indirectly or incidentally affect interstate commerce, such fact does not render the state statute unconstitutional. The maximum amount of fare named in a state statute that a railroad company may charge has never been considered an infringement upon the commerce clause of the federal constitution; it is not, however, exempted from the limitations of the fourteenth amendment, according to the recent decisions of this Court.

**The Statute is Not Unconstitutional Because of Classification of Railroads. It is Just and Founded upon Substantial Differences.**

The plaintiff contends that said chapter 41 is unconstitutional because of the manner in which it classifies the railroads. The defendants contend that it is not unconstitutional for that reason. The classification is just and founded upon substantial differences, and therefore is within the constitutional right of the legislature to so classify. The classification operates uniformly upon all of the classes. All railroads in similar circumstances are brought within the terms of the statute. It is true the statute does not operate uniformly upon the different classes of railroads. But this is not necessary under the law.

The law text book writers and the courts in their decisions, recognize the inherent right of state legislatures to classify subjects of legislation, provided there is a substantial difference between the subjects classified. If there is a reasonable or substantial difference in such classification, the judgment of the legislature is conclusive. If, however, the classification is arbitrary and without reasonable differences, the courts will interpose. Classification founded upon reason and distinction is upheld; arbitrary classification without reason and without distinction is condemned. The court of last resort in the state of West Virginia, in passing upon the constitutionality of sections 86 and 87 of chapter 35 of the acts of the legislature of 1901 of that state, in classifying and defining resident and non-resident corporations for the purposes of taxation, held that statute constitutional, and said that it did not violate section 1 of article 10 of the state constitution, nor clause 1 of section 10 of article 1 of the federal constitution, nor the fourteenth amendment to that constitution.

*Blue Jacket Con. Cop. Co.* v. *Scherr, Auditor,* 50 W. Va. 533, syl. 4;
Brannon's Fourteenth Amendment, page 323.

It is true that the case of *Copper Company* v. *Scherr, Auditor, supra,* passed upon the classification of a statute for taxation purposes, but it is not perceived why the principle enunciated in that opinion is not applicable to the case under consideration, or why a more unjust and unreasonable classification would be allowed in matters of taxation than in the regulation of passenger rates on railroads. Is it not as important to protect a citizen, who is developing the natural resources of the state and thereby adding to its wealth, against excessive railroad charges, as it is to protect him against excessive taxation?

In discussing the question of classification, it becomes necessary to discuss the "due process of law" and the "equal protection" clause of section 1 of the fourteenth amendment to the federal constitution.

The statute under consideration is just and reasonable in its classification, and therefore does not come within the legal prohibition. The Supreme Court of Appeals of West Virginia, in the Coal & Coke case, in construing this same statute, said:

"Legislative classification of railroads, according to the length of the line of the road, treating connecting roads, operated under one management, as a single road, for the purposes of rate regulation, is founded upon substantial differences, having direct and just relation to the purposes of the legislation, and is not in conflict with the clause of the fourteenth amendment to the constitution of the United States, guaranteeing to all persons the equal protection of the laws, when the rates, prescribed by it, apply alike to all roads of the same class." Syl. 39.

"Subjection of one class of railroads to an inflexible passenger rate, and another class to a variable one, based on annual gross earnings, does not work discrimination, invalidating the law under said constitutional amendment." Syl. 40.

"Failure to regulate charges of railroads under six miles in length and electric lines and street railways, otherwise than by the inhibition of unreasonable charges does not invalidate railroad rate legislation, applicable to steam railroads and unimpeachable upon any other ground." Syl. 41.

*C. & C. Ry. Co.* v. *Conley & Avis*, 67 W. Va. 129.

The subject dealt with by the court in the syllabus quoted above from the Coal & Coke case is one of state law expounded by a state court. The laws and the construction put upon them apply equally to all persons in a like situation, and therefore cannot be regarded as conflicting with the provisions of the federal constitution.

*Magoun* v. *Ill. T. & S. Bank*, 170 U. S. 283 (42 L. ed. 1037).

**The States Have the Constitutional Power to Classify Railroads.**

The plaintiff contended in the state courts that the legislature could not constitutionally fix a rate based on the length of line for a certain class of railroads, and also fix a rate based on the gross or the net income of another class. I do not perceive by what method of reasoning such a classification would be unreasonable. It is not shown in the record in this case that such a classification is prejudicial to the plaintiff. The defendants in their answer deny that the statute is prejudicial to the plaintiff, and the railway company failed to offer proof to sustain its contention. It was incumbent on the plaintiff to clearly prove to the entire

satisfaction of the courts that the statute operates to its prejudice, if it hopes to prevail in this cause.

> "The rules by which this contention must be tested, as is shown by repeated decisions of this court, are these: 1. The equal protection clause of the 14th Amendment does not take from the state the power to classify in the adoption of police laws, but admits of the exercise of a wide scope of discretion in that regard, and avoids what is done only when it is without any reasonable basis, and therefore is purely arbitrary. 2. A classification having some reasonable basis does not offend against that clause merely because it is not made with mathematical nicety, or because in practice it results in some inequality. 3 When the classification in such a law is called in question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed. 4. One who assails the classification in such a law must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary."
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> *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U. S. 61 (55 L. ed. —).

See also the case of *Engle* v. *O'Malley*, 219 U. S. 128 (55 L. ed. —) and cases therein cited by the Court.

The acts of the legislature of West Virginia of 1872-3, and as amended by the legislature of 1875, (see supplement in back of this brief), exempted from its operation railroads of less than six miles in length (serial section 2481, W. Va. Code, 1906); and railroads operated by steam or horse power of not exceeding thirty miles in length were allowed to charge a different rate (serial section 2488); also, a city or street railroad, without regard to length or earnings, was exempted (serial section 2481). Said statutes were passed upon in the year 1884 by the court of last resort in West Virginia, and Judge Green, speaking for the court, at page 373, said:

> "Chapter 227 of the Acts of 1872-3 is a valid act passed in pursuance of section 9, article 11 of our constitution, and in conflict with no provision of our constitution, and, as we have seen, in conflict with no provision of the Constitution of the United States," etc.
>
> *Railroad Co.* v. *Transportation Co.*, 25 W. Va. 324.

Such classification of railroads has been the recognized and unquestioned law of West Virginia from 1884 until the year 1907, when some of the large railroads in that state, smarting under the restraining hand of the federal congress and the legislatures of the various states, began a concerted attack throughout the country on all laws that in any manner attempted to regulate their operations and to prescribe maximum rates of charges. Hence the attack of the Chesapeake & Ohio Railway Company on the statute now under consideration.

If the legislature can constitutionally exempt railroads six miles and thirty miles in length, why can it not exempt railroads fifty miles in length? If it can exempt city railroads and street railroads, why can it not also exempt electric roads and narrow gauge roads? Electric roads are comparatively new in railroad development. They belong in a class to themselves. Narrow gauge railroads belong in a class to themselves. We must apply the law to the conditions as they are found in West Virginia, not as to what they may be in other states, or what they might be in the distant future. This Court in substance said:

> "The equal protection of the laws, which is guaranteed by the fourteenth amendment of the constitution, does not forbid classification. The fact of inequality produced by classification does not determine its constitutionality."
>
> *Atchison, Topeka & S. Fe R. R. Co.* v. *Mathews*, 174 U. S. 96 (43 L. ed. 909, syl. 2).

To the same effect are the cases of *Orient Insurance Co.* v. *Daggs*, 172 U. S. 557 (43 L. ed. 552); *Mo. Pac. R. R. Co.* v. *Mackey*, 127 U. S. 205 (32 L. ed. 107).

**Railroads Classified on Length of Line More Constant Test.**

The classification of railroads based upon length of line has been held by this Court to be *"the simpler and more constant test"* than other classifications. Mr. Justice Gray, at page 691, speaking for the Court, said:

> "The Legislature, in the exercise of its power of regulating fares and freights, may classify the railroads according to the amount of the business which they have

done or appear likely to do. Whether the classification shall be according to the amount of passengers and freight carried, or of gross or net earnings, during a previous year, or *according to the simpler and more constant test of the length of the line of the railroad, is a matter within the discretion of the Legislature.* If the same rule is applied to all railroads of the same class, there is no violation of the constitutional provision securing to all the equal protection of the laws."

*Dow* v. *Beidelman*, 125 U. S. 680 (31 L. ed. 841).

The same Arkansas statute that was passed upon in the *Dow-Beidelman* case, *supra*, was later passed upon and again sustained by this Court in the case of the *St. Louis & San Francisco Railway Company* v. *John R. Gill*, and reported in 156 U. S. 649 (39 L. ed. 567).

This Court, in the *Dow-Beidelman* case, *supra*, on page 681 of the official report, further says:

"A similar question was presented and decided in *Chicago, Burlington & Quincy Railroad Co.* v. *Iowa*, above cited. It was there objected that a statute regulating the rate for the carriage of passengers, by different classes of railroads, according to their gross earnings per mile, was in conflict with art. 1, sec. 4, of the Constitution of Iowa, which provides that 'all laws of a general nature shall have a uniform operation,' and 'the General Assembly shall not grant to any citizen, or class of citizens, privileges or immunities which upon the same terms shall not equally belong to all citizens.' In answering that objection, the Chief Justice said: 'The statute divides the railroads of the State into classes, according to business, and establishes a maximum of rates for each of the classes. It operates uniformly on each class, and this is all the Constitution requires.' 'It is very clear that a uniform rate of charges for all railroad companies in the state might operate unjustly upon some. It was proper, therefore, to provide in some way for an adaption of the rates to the circumstances of the different roads; and the General Assembly, in the exercise of its legislative discretion, has seen fit to do this by a system of classification. Whether this was the best that could have been done is not for us to decide. Our province is only to determine whether it could be

done at all, and under any circumstances. If it could, the Legislature must decide for itself, subject to no control from us, whether the common good requires that it should be done."

See also the case of *C. B. & Q. R. R. Co. v. Iowa* (Cutts), 94 U. S. 155 (24 L. ed. 94).

**Statute Uniform Upon Each Class. If Statute Does Not Reach, the Common Law Applies.**

It cannot be truthfully denied that the statute in question is general and uniform upon all railroad corporations and persons doing a railroad business who are similarly situated. This statute does not grant to any railroad corporation in the same class any privilege or immunity which does not equally belong to every other railroad company in that class. Whenever any railroad comes within any class named in the statute, it has all the privileges and immunities that are granted by the statute to any other railroad in the same class. This is all the constitution requires, as has been held repeatedly by this Court.

The contention of the plaintiff in the state courts that the statute complained of does not afford to the plaintiff the equal protection of the laws, because said statute leaves certain railroads unclassified, is without merit. If there were, as a matter of fact, any railroad companies in West Virginia that did not come within some statutory regulation, such railroads would be regulated by the principles of the common law. Article 6, section 21 of the West Virginia constitution says:

> "Such parts of the common law, and of the laws of this State as are now in force when this article goes into operation, and are not repugnant thereto, shall be and continue the law of the state until altered or repealed by the legislature."

If the clause in the West Virginia constitution (article 11, section 9) commanding the legislature to regulate rates, and all legislation based thereon, were wiped out of existence, yet the railroads operating in West Virginia, whether more or less than fifty miles in length, would be regulated by the common law, which demands that such rates must be just and reasonable. It is equally true

that interstate commercial transactions are controlled by the common law, except so far as they are modified by congressional enactments. In the case of the *Interstate Commerce Commission* v. *Baltimore & Ohio Railroad Company*, Mr. Justice Brown, speaking for the Court, said:

> "Prior to the enactment of the act of February 4, 1887, (24 stat. at L. 379,) to regulate commerce, commonly known as the Interstate Commerce Act, railway traffic in this country was regulated by the principles of the common law applicable to common carriers, * * * *"
>
> *Interstate Com. Com.* v. *B. & O. R. Co.*, 145 U. S. 263 (36 L. ed. 699.)

The late Mr. Justice Brewer, in answering the contention that the common law did not apply to interstate commercial transactions, in the case of *Western Union Telegraph Company* v. *Call Publishing Company*, on page 102 of the official report, said:

> "We are clearly of the opinion that this cannot be so, and that the principles of the common law are operative upon all interstate commercial transactions, except so far as they are modified by congressional enactment."
>
> *West U. Tel. Co.* v. *Call Pub. Co.*, 181 U. S. 92 (45 L. ed. 765.)

All railroad rate legislation is only declaratory of the common law, and the remedies furnished by statute are merely cumulative and not exclusive thereof.

> "It is true that the provisions of the interstate commerce act prohibiting unjust and unreasonable charges and unjust discrimination are merely declaratory of the common law. And the remedies afforder by the act of Congress for such practices are cumulative and are not exclusive of the remedies existing at common law."
>
> *Lowry* v. *C. B. & Q. R. Co.*, 46 Fed. Rep. 85.

**Statute Does Not Wholly Repeal Former Rate Legislation.**

The Supreme Court of West Virginia in the Coal & Coke case has decided that chapter, 41 Acts of the Legislature of 1907, covering only a part of the subject of railway rate legislation, does not

wholly repeal former legislation relating to that subject, but that said chapter 41 and the Acts of 1872-3 and amendments thereto regulating passenger rates, should be read *in pari materia*. (For said statutes see supplement in back of this brief). That court said:

> "Covering only a part of the subject of railway rate legislation, chapter 41 of the Acts of 1907 does not wholly repeal former legislation, relating to the same subject either by implication or express provision. It impliedly amends chapter 227 of the Acts of 1872-3, as amended by chapter 42 of the Acts of 1885, repealing such former legislation only so far as it is clearly inconsistent therewith." Syl. 32.
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> "For the purposes of chapter 227 of the Acts of 1872-3, as well as chapter 41 of the Acts of 1907, two railroads, operated in connection with one another, under a lease of one by the other, or otherwise, constitute a single railroad." Syl. 33.
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> "Chapter 41 of the Acts of 1907 divides steam railroads into two classes for the purposes of passenger rate regulation, subjecting all railroads, as above defined, fifty miles long and over, to a limit of two cents per mile, in the case of adults, with trivial exceptions, and leaving all others subject to the former legislation, applicable to them at the date of the passage of said act." Syl. 34.
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> "In construing a statute amending existing law by implication, such existing legislation is to be considered not only as an act *in pari materia*, but also as a live, operative and effective law, in so far as it is not repealed, determining, in part, the meaning of the new provision by its force and effect for both must stand and operate together as far as possible." Syl. 38.
>
> *C. & C. Ry. Co.* v. *Conley & Avis, supra.*

The construction placed upon the statute complained of in the four paragraphs of the syllabus last quoted above from the Coal & Coke case is the view of the court of last resort in West Virginia, and on that subject will be accepted by this Court as an accurate statement of the law of that state.

*Orr* v. *Gilman*, 183 U. S. 278 (46 L. ed. 196).

**Other Classifications.**

In the case of *American Sugar Refining Company* v. *Louisiana*, a tax was imposed on those engaged in carrying on the business of refining sugar and molasses, but excepted from the operations of the law planters and farmers grinding and refining their own sugar. This legislation, which entirely exempts a certain class from the operation of the law, was held constitutional by this Court. In that case Mr. Justice Brown, at page 92, used the following language:

> "The act in question does undoubtedly discriminate in favor of a certain class of refiners, but this discrimination if founded upon a reasonable distinction in principle, is valid. Of course, if such discrimination were purely arbitrary, oppressive, or capricious, and made to depend upon differences of color, race, nativity, religious opinions, political affiliations, or other considerations having no possible connection with the duties of citizens as tax payers, such exemption would be pure favoritism, and a denial of the equal protection of the laws to the less favored classes."
>
> *Am. Sugar Ref. Co.* v. *La.*, 179 U. S. 89 (45 L. ed. 102).

In the case of the *Consolidated Coal Company* v. *Illinois*, 185 U. S. 203 (46 L. ed. 872), this Court held as constitutional a classification of coal mines that provided for inspectors whose fees should be paid by the owners of such mines, and exempted from the operation of such law certain other mines where five men or less were employed at one time.

A statute of New York fixing elevator charges that applied only to cities of 130,000 or over was held constitutional.

*Budd* v. *N. Y.*, 143 U. S. 517 (36 L. ed. 247).

The city council of Kansas City passed an ordinance regulating the speed of railroad trains running through that city, limiting such speed to six miles an hour, but section 8 exempted the application of said ordinance "to the Interstate Rapid Transit Railway Company, excepting with reference to funeral or other processions." The contention in this Court was that the provisions of said ordinance "creates a classification which is arbitrary and

without any reasonable basis, and therefore operates to deny the equal protection of the laws." In answer to that contention, this Court held that such a classification was not "arbitrary or without reasonable reference to the conditions of the several roads." On page 587 of the official report, the Court said:

> "All that is necessary to uphold the ordinance is that there is a difference, and *that* existing it is for the city council to determine whether separate regulations shall be applied to the two, * * * * Given the fact of a difference, it is a part of the legislative power to determine what difference there shall be in the prescribed regulations."
>
> *Erb.* v. *Morasch*, 177 U. S. 584 (44 L. ed. 897).

This Court held a statute constitutional which forbade stoves or furnaces kept inside passenger cars for heating said cars on steam railroads, and which excepted railroads less than fifty miles in length.

> *N. Y., N. H. & H. R.* v. *New York*, 165 U. S. 628 (41 L. ed. 853).

This Court has further held that a street railway is not denied the equal protection of the laws by a municipal tax on its business at a rate of one hundred dollars per mile of its trackage in the city streets, because a steam railway company making an extra charge for local deliveries of freight brought over its road from outside the city, is not subject to the same tax.

> *Savannah T. & I. of H. R. Co.* v. *Savannah*, 198 U. S. 392 (49 L. ed. 1097).

A tax on express companies was sustained by this Court while the law excepted railroads and steam companies therefrom, although they were engaged in the express business,

> *Pac. Ex. Co.* v. *Seibert*, 142 U. S. 339 (35 L. ed. 1035).

A statute was held valid by this Court which required the full amount of a policy to be paid by fire insurance companies and did not require the same by other insurance companies, such as tornado, accident and the like.

> *Orient Ins. Co.* v. *Daggs*, 172 U. S. 599 (43 L. ed. 552).

In the case of *Watson* v. *Maryland*, this Court favorably passed upon a Maryland statute that made certain exceptions of persons entitled to practice medicine, etc., in that state. The law was attacked as unconstitutional as in violation of due process and the equal protection of the law. On page 179 of the official report, this Court said:

> "Before a law of this kind can be declared violative of the 14th Amendment as an unreasonable classification of the subjects of such legislation because of the omission of certain classes, the court must be able to say that there is 'no fair reason for the law that would not require with equal force its extension to others whom it leaves untouched.' Such was the expression of this court in *Missouri, K. & T. R. Co.* v. *May*, 194 U. S. 269, 48 L. ed. 972, quoted with approval in *Williams* v. *Arkansas, supra.*"
>
> *Watson* v. *Maryland*, 218 U. S. 173 (54 L. ed. 987).

**Legislature the Judge of the Necessity of Legislation.**

The legislature that enacted the statute complained of was familiar with the local conditions in West Virginia. The legislature is primarily the judge of the necessity of such enactments. It does not matter that a court may differ from the legislature in its views of the advisability of enacting such laws, or that the judges may have ideas of their own concerning the public policy of a legislature along such lines. Such affords no grounds for judicial interference unless the statute now under consideration is "*unmistakably and palpably in excess of legislative power.*"

*Jacobson* v. *Mass.*, 197 U. S. 11 (49 L. ed. 643);
*Donovan* v. *Pa. Co.*, 199 U. S. 279 (50 L. ed. 192);
*Flint* v. *Stone Tracy Co.*, 220 U. S. 107 (55 L. ed. —).

**Objections to Statute Not Well Founded.**

The objections urged by the plaintiff against the statute under consideration are certainly not well founded when considered in the light of the decisions of this Court. It seems to me the arguments of counsel for the plaintiff in this case are squarely met by the statement of this Court in the case of the *Standard Oil Company* v. *Tennessee*, when Mr. Justice Holmes for the Court said:

"The foregoing argument is one of the many attempts to construe the 14th Amendment as introducing a factitious equality without regard to practical differences that are best met by corresponding differences of treatment."

*Standard Oil Co.*, v. *Tenn. ex rel. Cates*, 217 U. S. 413 (54 L. ed. 817.)

The classifications made in the Tennessee statute, referred to in the last case above, are not founded upon as substantial differences or as just grounds of classification as the statute now under consideration. If the Tennessee statute is not unconstitutional, then clearly the statute involved in this litigation is not unconstitutional.

This Court has uniformly held that state legislatures have a very wide discretion in classifying railroads and other corporations serving the public, for both regulation and taxation purposes. You have also uniformly held that when the classification was based on a reasonable distinction in principle, it was not a denial of due process of law or the equal protection of the law, and therefore did not conflict with any provision of the federal constitution. The statute involved in this litigation as construed by the state courts meets every requirement of the state and the federal constitutions, and the decisions of this Court. For the convenience of the Court, we cite the following additional cases to substantiate this contention:

*State of Connecticut* v. *Woodruff*, 153 U. S. 689 (38 L. ed. 869);
*Mo. K. & T. R. Co.* v. *May*, 194 U. S. 267 (48 L. ed. 972).
*McLean* v. *Ark.*, 211 U. S. 539 (53 L. ed. 315, syl. 2);
*Hammond Packing Co.* v. *Ark.*, 212 U. S. 322 (53 L. ed. 530, syl. 2);
*Williams* v. *Ark.*, 217 U. S. 79 (54 L. ed. 673);
*Southwestern Oil Co.* v. *Tex.*, 217 U. S. 114 (54 L. ed. 688);
*Brown-Foman Co.* v. *Ky.*, 217 U. S, 563 (54 L. ed. 883);
*Louisville & N. R. Co.* v. *Melton*, 218 U. S. 36 (54 L. ed. 921).
*Griffith* v. *Conn.*, 218 U. S. 563 (54 L. ed. 1151);
*Cin. I. & W. R. Co.* v. *Connersville*, 218 U. S. 336 (54 L. ed. 1060).
*B. & O. R. R. Co.* v. *Interstate Com. Com.*, reported in Advance sheet July 1, 1911, pp. 621 to 627.

The courts of many states as well as this Court have held valid fellow-servant laws which applied only to corporations, or to certain corporations, in exclusion of other employers of labor, as is shown by the following cases considered in point:

*McAnnish* v. *M. & M. Co.*, 20 Ia. 338;
*Boston* v. *State*, 32 N. H. 215;
*Kirby* v. *Pa. Co.*, 76 Pa. St. 506;
*Pitts Co.* v. *Montgomery*, 152 Ind. 1;
*Mo. Pac.* v. *Mackay*, 127 U. S. 205 (32 L. ed. 107);
*M. & St. L. R Co.* v. *Herrick*, 127 U. S. 210 (32 L. ed. 109);
*Minn. Oil Co.* v. *Kline*, 199 U. S. 593 (50 L. ed. 322);
*Holden* v. *Hardy*, 169 U. S. 366 (42 L. ed. 780).

**Classification Could be Eliminated and the Remainder Would Stand as a Complete, Effective Law.**

What I have heretofore said about eliminating the penalty clause of the statute, can, with equal force, be applied to the classification feature of that statute, which is in part incorporated in the penalty clause, and the authorities hereinabove cited relating to the penalty clause in that regard, are also applicable to the classification feature. The exceptions contained in the statute are not, in my opinion, so dependent upon the other provisions thereof that the exceptions cannot be separated. Eliminate all exceptions and the statute would stand as a complete, effective law without classification. Or eliminate section two and the railroads would be classified on the length of the lines. The will of the legislature was to regulate the railroads of this state in a reasonable charge for the carriage of intrastate passengers, in pursuance of the constitutional mandate that it pass a law "applicable to all railroad corporations in the state establishing reasonable maximum rates of charges for the transportation of passengers and freights."

Judge Cooley, in his great work on Constitutional Limitations, page 255, lays down the rule that has been universally followed by the courts of this country. At page 256, in speaking of the rule where any portion of the statute is void, Judge Cooley says:

> "The rule is not different when the question is whether any portion of a statute is void, than when the whole is assailed. The excess of power, if there is any, is the same in either case, and is not to be applied in any instance."

Judge Cooley, on said page 256, goes further and says:

> "And on this ground it has been held that where the repealing clause in an unconstitutional statute repeals all inconsistent acts, the repealing clause is to stand and have effect, notwithstanding the invalidity of the rest."

At page 257 Judge Cooley further says:

> "From what examination has been given to this subject, it appears that whether a statute is constitutional or not is always a question of power; that is, a question whether the legislature in the particular case, in respect to the subject-matter of the act, the manner in which its object is to be accomplished, and the mode of enacting it, has kept within the constitutional limits and observed the constitutional conditions. In any case in which this question is answered in the affirmative, the courts are not at liberty to inquire into the proper exercise of the power. They must assume that legislative discretion has been properly exercised."

See cases of *Bridges* v. *Shallcross*, 6 W. Va. 562, and *Flint* v. *Stone Tracy Co.*, 220 U. S. 107, *supra*.

**Cotting and Connolly Cases Not Applicable to This Case.**

Counsel for the railroad company seem to place great reliance in the *Cotting case* (183 U. S. 79) and in the *Connolly case* (184 U. S. 540). I fail to comprehend where these two cases are applicable to the case now under consideration in the manner the plaintiff seeks to apply them. Mr. Justice Brown, in delivering the opinion of this Court, in the case of *Coal Company* v. *Illinois*, in speaking of the classification involved, and in discussing the *Cotting case* used the following language:

> "This is a species of classification which the legislature is at liberty to adopt, provided it be not wholly arbitrary or unreasonable, as it was in *Cotting* v. *Kansas City Stock Yards Co.* * * * *, in which an act defining what should constitute public stock yards and regulating all charges connected therewith, was held to be unconstitutional, because it applied only to *one particular company and not to other companies or corporations engaged in a like business in Kansas,*

and thereby denied to *that company* the equal protection of the laws. In the case under consideration there is no attempt arbitrarily to select *one* mine for inspection. * * * * "

*Consolidated Coal Co.* v. *Ill.*, 185 U. S. 203 (46 L. ed. 872).

**Application of Fifth and Fourteenth Amendments.**

If this Court throws around the due process of law clause of the federal constitution certain prescribed restrictions in its inhibition against the states, then it must throw the same restrictions around the fifth amendment in its inhibition against the federal government. The due process clause of the fourteenth amendment, in its inhibition against the states, is as follows:

"Nor shall any state deprive any person of life, liberty. or property without due process of law."

The due process clause of the fifth amendment, in its inhibition against the federal government, is as follows:

"Nor (shall any person) be deprived of life, liberty, or property without due process of law."

These two provisions are identical. Their application to the states and the federal government stands upon the same legal ground. If the statute under consideration falls within this provision of the fourteenth amendment because of classification or of the penalties prescribed, or for any other reason, then numerous United States statutes must fall under the fifth amendment because of classification or because of their severe penalties.

**Two Cent Passenger Legislation of Early Origin.**

I am not prepared to deny, as suggested by counsel for plaintiff at page 10 of their brief, that it was "a divine command" that caused the legislature to pass laws regulating railroad companies and other large corporations. It was at least a public demand on the legislatures for the public good, but I deny, on behalf of the legisture that it was a "spasm" or a "mania," and that such legislation was new. An Act of the Assembly of Pennsylvania, passed April 4, 1833, relating to a railroad company of that state, in part, provided:

"That the toll on any species of property shall not exceed an average of four cents per ton per mile, nor upon each passenger an average of *two cents per mile.*"

And section 24 of said act required—

"The company at the end of the three years after the charter should be obtained, and at the end of every year thereafter, to furnish to the legislature a verified abstract of their accounts, showing the amount of capital paid in and the debts of the company, the amounts received for tolls and transportation, and rates charged, and the amount of dividend declared."

Acts 1833, No. 76, pp. 144-154.

It will be seen from the foregoing that recent legislatures are going back to first principles that prevailed in the earliest history of railroad management, and that it is no sudden "spasm" or "mania" that has seized the representatives of the people. The officers and counsel of railway companies seem to lose sight of the fact that such companies are public highways on which every person may travel upon the payment of a "just and reasonable" compensation and are subject to legislative regulation for the public good. Sec. 9, art. 11, W. Va. Const. They were made so in England where they originated; Acts 5 and 6 Victoria, chapter 55. The Railway Clause Consolidation Act, passed in 1842, provided in detail the use of railways. Suits were sustained to compel railway companies to keep up their roads for the use of the public. *King* v. *Severn R. Co.*, 2 B. & Ald. 646; *Queen* v. *Grand Junction R. Co.*, 4 Q. B. 18; 2 Redfield, sec. 249; Pierce American Railroad Law, 519.

I have heretofore shown from authorities cited, that the purpose or motive of the Congress or of the state legislatures in exercising their lawful legislative functions, is not a subject for judicial inquiry. Counsel for the railway company in this case, in their factitious criticism of legislative bodies, beginning on page 10 of their brief, indicate that they overlooked this well established doctrine, and come here asking this Court to disregard its former decisions on that subject. So, in accordance with the universal course of decision in this country, not only as regards the legislative powers of the Congress, but also the exercise of the same powers by the legislatures of the several states, the principle ad-

hered to by all well considered decisions upon this subject is, that it is not within the province of the judiciary to inquire into the motives actuating the law making bodies.

Mr. Justice Day, in the case of *Flint et al.* v. *Stone Tracy Co. et al.*, 220 U. S. 107, quotes with approval from the case of *McGray* v. *United States*, 195 U. S. 27 (49 L. ed. 78) as follows:

> "No instance is afforded from the foundation of the government where an act which was within a power conferred was declared to be repugnant to the Constitution because it appeared to the judicial mind that the particular exertion of constitutional power was either unwise or unjust."

To further substantiate this doctrine and to convince counsel for the plaintiff that it is not of recent origin, I cite the following federal and state authorities as bearing upon this subject:

*Fletcher* v. *Peck*, 6 Cranch (U. S.) 131; *Ex Parte McCardle*, 7 Wall. (U. S.) 514; *Doyle* v. *Continental Ins. Co.*, 94 U. S. 535; *Kountze* v. *Omaha*, 5 Dill. (U. S.) 443; *Little Rock* v. *North Little Rock*, 72 Ark. 195; *Ex parte Newman*, 9 Cal. 502; *Fowler* v. *Pierce*, 2 Cal. 168; *People* v. *Bigler*, 5 Cal. 24; *Sherman* v. *Story*, 30 Cal. 266; *Harpending* v. *Haight*, 39 Cal. 202; *Dobbins* v. *Los Angeles*, 139 Cal. 179; *Odd Fellows' Cemetery Assoc.* v. *San Francisco*, 140 Cal. 226; *In re Smith*, 143 Cal. 368; *State* v. *Burris*, (Del. 1901), 49 Atl. Rep. 930; *Lyon* v. *Morris*, 15 Ga. 480; *Wright* v. *Kelley*, 4 Idaho 624; *Bellevue Water Co.* v. *Stockslager*, 4 Idaho 636; *Blaine County* v. *Heard*, 5 Idaho 6; *Wright* v. *Defrees*, 8 Ind. 298; *McCulloch* v. *State*, 11 Ind. 424; *Evans* v. *Browne*, 30 Ind. 514; *Downey* v. *State*, 160 Ind. 578; *Wichita* v. *Burleigh*, 36 Kan. 34; *Johnson* v. *Higgins*, 3 Met. (Ky.) 566; *State* v. *Fagan*, 22 La. Ann. 545; *Baltimore* v. *State*, 15 Md. 376; *Atty. Gen.* v. *Williams*, 178 Mass. 330; *Flint, etc., Plank-road Co.* v. *Woodhull*, 25 Mich. 99; *Atty. Gen.* v. *Lake County*, 33 Mich. 289; *Brown* v. *Cape Girardeau*, 90 Mo. 377; *State* v. *Hays*, 49 Mo. 604; *Bradshaw* v. *Omaha*, 1 Neb. 16; *Humboldt County* v. *Churchill County*, 6 Nev. 30; *Moore* v. *Steel Com'r.*, 62 N. J. L. 386; *People* v. *Draper*, 15 N. Y. 545; *People* v. *Flagg*, 46 N. Y. 401; *People* v. *Petrea*, 92 N. Y. 139; *Waterloo Woolen Mfg. Co.* v. *Shanahan*, 128 N. Y. 345; *Kittinger* v. *Buffalo Traction Co.*, 160 N. Y. 377; *Pearce* v. *Stephens*, 18 N. Y. App. Div. 101, *affirmed* 153 N. Y. 673; *Sun Print-*

*ing, etc., Assoc.* v. *New York*, 8 N. Y. App. Div. 230; *State* v. *Smith*, 44 Ohio St. 348; *Miller* v. *State*, 3 Ohio St. 484; *Sunbury, etc., R. Co.* v. *Cooper*, 33 Pa. St. 278; *Jones* v. *Jones*, 12 Pa. St. 350; *Com.* v. *Moir*, 199 Pa. St. 534; *Com.* v. *Keary*, 198 Pa. St. 500; *State* v. *Cardozo*, 5 S. Car. 297; *Luehrman* v. *Jaxing Dist.*, 2 Lea (Tenn.) 425; *Lynn* v. *Polk*, 8 Lea (Tenn.) 293; *Ballentine* v. *Pulaski*, 15 Lea (Tenn.) 634; *Williams* v. *Nashville*, 89 Ten. 487; *State* v. *Lindsay*, 103 Tenn. 625; *Slack* v. *Jacob*, 8 W. Va. 613.

**Argument for Plaintiff Answered by Opinions of State and Federal Courts.**

I note with some surprise the line of argument advanced by counsel for the railway company at pages 21 to 30, both inclusive, in their printed brief. The same line of argument was made in the state courts, by the same counsel, and the court of last resort in West Virginia fully answered that arugument in the Coal & Coke case, *supra*. I quote as follows from that opinion.

> "The proviso in said chapter 41 of the Acts of 1907, saying 'Nothing in this act shall apply to any railroad in this state under fifty miles in length and not a part of, or under the control, management or operation of any other railroad, over fifty miles in length, operating wholly or in part in the state,' is construed as meaning the same as if it had said 'Nothing in this act shall apply to any railroad in this state under fifty miles in length and not a part of, or under the control, management or operation of any other railroad, whose entire length is over fifty miles." Syl. 35.
>
> "The words, 'under the control, management or operation,' are used in the appositive, not the alternative, sense, and mean the same as the words, 'a part of .'" Syl. 36.
>
> "A railroad owned, controlled or operated by another, but not connecting therewith, is not a part thereof." Syl. 37.
>
> "Chapter 41 of the Acts of 1907 is, in all respects, valid on its face." Syl. 42.

The labored effort of the railway company's counsel to explain away the force of the *Dow-Beidelman case, supra*, is very noticeable. If that case is not applicable, as they contend, why do they labor so long and earnestly to avoid its force and effect? The reason is plain: The case sustains the statute under consideration. This Court, in that case, said:

> *"Whether the classification shall be according to the amount of passengers and freight carried, or of gross or net earnings during the previous year, or according to the simpler and more constant test of the length of the line of railroad, is a matter within the discretion of the legislature."*

The statute attacked uses both of the above authorized methods and falls within the foregoing rule—a rule laid down by this great Court in an able and well considered and carefully prepared opinion, and, so far as my investigation has extended, this Court has never departed from that rule. The plaintiff comes here asking this Court to say, that it did not say what it said in the *Dow-Reidelman case;* but if you did say what you said, then what you did say does not mean what you said. The best answer to the contention of the plaintiff is the opinions of this Court herein quoted from and referred to.

**Nothing in Record to Sustain Contentions of Plaintiff.**

Counsel for the railway company in their brief, at page 34, say:

> "Forty-five railroads in West Virginia are left without any sort of regulation. Some of them go into territories where they have monopolies of the entire business, and yet their charges are not limited, and, indeed, an Act which did limit charges has been repealed. They may now charge whatever financial necessity may demand."

There is absolutely no proof in this case showing the number of railroads in West Virginia to which the statute applies, but even if there were such evidence, the statement of counsel for the plaintiff quoted above is without foundation in law. This same contention was made in printed brief by the same counsel as *amici curiae* and as counsel for the Chesapeake & Ohio Railway Company, in the case of *Coal & Coke Railway Company* v. *Conley & Avis, supra*, attacking this same statute. The Supreme Court of Appeals of West Virginia refutes the above statement of counsel for the plaintiff.

That court says there are no railroads in West Virginia "left without any sort of regulation." Neither are there railroads in West Virginia where "their charges are not limited." Neither is

it true that the "act which did limit charges has been repealed." For further answer to plaintiff's counsel, see page 175 *et seq.* of the Coal & Coke case, reported in 67th West Virginia. I let the Supreme Court of West Virginia still further answer opposing counsel, and quote from the syllabus written by the court, as follows:

> "Covering only a part of the subject of railway rate legislation, chapter 41 of the Acts of 1907 does not wholly repeal former legislation, relating to the same subject, either by implication or express provision. It impliedly amends chapter 227 of the Acts of 1872-3, as amended by chapter 42 of the Acts of 1885, repealing such former legislation only so far as it is clearly inconsistent therewith." Syl. 32.
>
> "For the purposes of chapter 227 of the Acts of 1872-3, as well as chapter 41 of the Acts of 1907, two railroads, operated in connection with one another, under a lease of one by the other, or otherwise, constitute a single railroad." Syl. 33.
>
> "Chapter 41 of the Acts of 1907 divides steam railroads into two classes for the purposes of passanger rate regulation, subjecting all railroads, as above defined, fifty miles long and over, to a limit of two cents per mile, in the case of adults, with trivial exceptions, and leaving all others subject to the former legislation, applicable to them at the date of the passage of said act." Syl. 34.
>
> *C. & C. R. Co. v. Conley & Avis, supra.*

The construction placed on a state statute by a state court, will be followed by this Court, when, as construed, it does not conflict with any provision of the federal constitution.

> ....*Minn. Iron Co. v. Kline*, 199 U. S. 593 (50 L. ed. 322);
> *Smiley v. Kansas*, 196 U. S. 447 (49 L. ed. 546);
> *Armour Packing Co. v. Lacy*, 200 U. S. 226 (50 L. ed. 451).

**"Electric Lines" Not in Class With Steam Railroads.**

Counsel for the railway company attack said statute because it excepts in section two (the penalty clause) electric lines. They do not contend, however, that there are electric lines in West Virginia fifty miles or over in length. In fact, there is no electric line in West Virginia fifty miles in length, as shown by the sworn

reports to the state board of public works of the electric lines doing business in West Virginia. Counsel also place great stress upon the fact that electric lines have greatly developed in Indiana, New York and other states. That can have no bearing on the conditions in West Virginia. The statute must stand or fall solely in its application to conditions in West Virginia, as I have heretofore shown from the decisions of this Court. The Court will not draw on its imagination for the probable changes that time may bring about. Electric lines, as well as street railways, stand in a class by themselves from steam railroads. All courts and all law text book writers so consider them. This Court will not declare this statute unconstitutional because, perchance, some time in the distant future the Chesapeake & Ohio Railway Company may change its motive power from steam to electricity. It will be time enough to meet that condition when the change is made. At the present, electric lines are in a class with street railways,—at least so far as conditions exist in West Virginia. For a discussion of this subject, see 1 Elliott on Railroads, sections 6 and 6*a*; 3 Elliott on Railroads, sections 1096*a* and 1096*bd*, second edition.

It seems to me that the argument of counsel for the railway company, in their attack on the constitutionality of the act complained of, lends but little, if any, support to the contention that the statute is unconstitutional, for there cannot be denied to the state legislature the effective exercise of its constitutional authority, as we have heretofore shown by the decisions of this Court. By virtue of the inherent or police power of state legislatures to regulate intrastate commerce, they may enact such laws, as in their judgment, may seem best for the safeguarding of persons and property that are transported in such commerce. The argument of counsel on the other side, in that regard, seems to fall within the statement of Mr. Justice Holmes, in the case of *Minnesota Iron Company* v. *Kline*, and quoted with approval by the present Chief Justice in the case of *Louisville & Nashville Railroad Company* v. *Melton*, *supra*, that such argument is "merely one of the many attempts to impart an overmathematical nicety to the prohibitions of the fourteenth amendment." Their argument tends to confuse the questions rather than to throw light on them, however serious they may be. I let the present Chief Justice of this Court answer their argument:

"In other words, reduced to its ultimate analysis the contention comes to this: that by the operation of the equal protection clause of the 14th Amendment, the states are prohibited from exerting their legitimate police powers upon grounds of the generic distinction obtaining between persons and things, however apparent such distinction may be; but on the contrary, must legislate upon the basis of a minute consideration of the distinctions which may arise from accidental circumstances as to the persons and things coming within the general class provided for. When the proposition is thus accurately fixed, it necessarily results that in effect it denies the existence of the power to classify, and hence must rest upon the assumption that the equal protection clause of the 14th Amendment has a scope and effect upon the lawful authority of the states contrary to the doctrine maintained by this Court without deviation. This follows, since the necessary consequence of the argument *is to virtually challenge the legislative power to classify, and the numerous decisions upholding that authority.* To this destructive end it is apparent the argument must come, since it assumes that however completely a classification may be justified by general considerations, such classification may not be made if inequalities be detected as to some persons embraced within the general class by a critical analysis of the relation of the persons or things otherwise embraced within the general class. A brief reference to some of the cases dealing with the power of a state to classify will make the error of the contention apparent.

* * * * * * * * * * * * *

"Again considering the subject in *Orient Ins. Co.* v. *Daggs*, 172 U. S. 557, it was reiterated that the legislature of a state has necessarily a wide range of discretion in distinguishing, selecting, and classifying, and it was declared that it was sufficient to satisfy the demand of the Constitution if a classification was practical, and not palpably arbitrary."

*Louisville & N. R. Co.* v. *Melton*, 218 U. S. 36 (54 L. ed. 921).

It seems to me that it cannot truthfully be said that the classification in the statute complained of is not practical; nor can it be said it is *"palpably arbitrary."* It has proven practical in its operation. The Baltimore & Ohio Railroad, the Kanawha & Michi-

gan Railroad and the Western Maryland Railroad, all trunk lines and interstate roads, unlike the Chesapeake & Ohio Railway Company, obey the mandates of the statute without litigation.

**Motive of Legislature Cannot be Impugned.**

Counsel for the railway company in their brief near the top of page 46, say:

> "It must be the inevitable conclusion of this Court that the act, as passed by the West Virginia Legislature, was directed simply against the main trunk lines operating in West Virginia, and was an attempt to reduce the passenger rates then in force over such lines and was not intended to benefit the public, but to punish the Railway Company."

There is nothing in the record in this case, in my opinion, to justify this statement of opposing counsel. They set up a state of facts in their brief that are not contained in the record, and argue the case from that standpoint. This Court will consider the case from the record as it is, and not from what it is stated to be by counsel on either side. There is no evidence that the statute was "directed simply against the main trunk lines operating in West Virginia." There is no evidence on which to base the charge that the legislature that passed the statute did not "intend to benefit the public." There is no evidence that it meant "to punish the railway company." Such charges are fulminations of the imagination, and are not, in my opinion, justified by the record in this case, or any facts outside the record. I do not belive this Court will impute such motives to the legislature. I have heretofore shown by the decisions of this Court, that even the judiciary cannot inquire into the motives actuating law making bodies.

*McGray* v. *U. S.*, 195 U. S. 27 (49 L. ed. 78);
*Flint* v. *Stone Tracy Co.*, 220 U. S. 107 (55 L. ed. —).

**CONCLUSION.**

It seems to me every argument advanced on behalf of the plaintiff in this case has been fully met and completely answered by the decisions of this Court quoted from and referred to in this brief. I earnestly but respectfully insist that the motion of the defendants made to this Court, on the 12th day of December,

1910, to dismiss the writ of error or to affirm the judgment or decree of the state court, ought to be sustained, for the reasons and upon the authorities cited in the argument accompanying that motion.

The plaintiff fails to sufficiently show in the record that the statute complained of operates adversely against it. The allegations in its bill are not substantiated by proof of any sort. Every material allegation of the bill is met and denied by the answer of the defendants. The plaintiff did not make out its case as required by the decision of the court of last resort in West Virginia, and before it can maintain its case in the courts, it must meet the requirements as to pleading and proof provided for by state statute and the decisions of state courts. The Supreme Court of Appeals of West Virginia, in the Coal & Coke case, *supra*, laid down the rules to govern cases of this kind. The plaintiff does not meet those rules. It does not make "*a strong and complete prima facie case.*" It does not accompany its bill by exhibits or "*statements, showing in detail the gross income, expenses and net earnings, sworn to and sustaining the allegations of the bill proper.*"

*C. & C. Ry. Co.* v. *Conley & Avis*, 67 W. Va. 129, syl. 44-7.

The pleadings not meeting these requirements, and the plaintiff announcing that it did not desire to take testimony (record page 26) in this cause, the state courts properly dismissed the plaintiff's bill with costs to the defendants. This was a question of state pleadings and will be followed by this Court, as has been heretofore shown.

I trust this Court can, notwithstanding its multitudinous duties, speedily determine this case. The statute involved has received the approval of all three of the departments of the state government of West Virginia. The people of that state are anxious that the litigation be ended and the statute upheld.

The suit has been pending since the 26th day of May, 1909, and since the 22d day of June 1909, the railroad company has been charging an increased rate for intrastate West Virginia passenger traffic over the rate prescribed by said statute.

Counsel for the railway company warned us in its former brief filed here opposing the advancement of this cause for early hearing, that "*the fight is only just begun,*" but the defendants in error have confidence that this Court will speedily decide the case in a manner to end the litigation.

It seems manifest that the writ of error was taken by the railway company for delay only. The delay already obtained has meant many thousands of dollars to it, with like amount taken from the intrastate West Virginia passengers over its line, to which the plaintiff is not entitled under the statute. And while it is true that the railway company issues to each of such passengers what is called a coupon showing the passenger has paid fare above the legal rate of two cents per mile, yet it is further true that such coupons are in many instances for small amounts; that many passengers receiving them do not understand their purpose or object; that there is no central place where such coupons can now be deposited for future redemption; and that by reason of which a large number of them are lost or mislaid, to the great injustice of such passengers and to the great benefit of the plaintiff; and in no event is it provided that passengers paying in excess of the legal rate can recover interest on such excess in the event this cause is decided against the railway company, whatever the accumulated aggregate excess in money may be. This operates to the benefit of the plaintiff and to the injustice of the persons compelled to pay such excess fares.

I earnestly contend, that the state court committed no error; that the statute complained of is a legal exercise of the constitutional powers of the legislature; that the classifications made in the statute are founded upon just and substantial differences; that there is a wide distinction between railroads operated by steam and railways operated by electricity; that this Court has laid down the rule in the *Dow-Beidelman case* that state legislatures may classify railroads according to the amount of passengers and freight carried, or according to their gross or net earnings during a previous year, or according to the length of the lines; that the statute under consideration comes under this rule and will be sustained. Therefore, I commit the case into the hands of the Court, firm in the belief that I represent the right and that the defendants in error will prevail.

Respectfully submitted,

WILLIAM G. CONLEY,
*Attorney General of West Virginia.*

Charleston, W. Va.,
Oct. 3, 1911.

## SUPPLEMENT.

### Act of the Legislature of 1907, The Statute Complained of.

"Chapter 41.

(Senate Bill No. 15.)

"AN ACT relating to and regulating passenger rates upon railroads in the state of West Virginia, and prescribing penalties for the violation thereof.

*Be it enacted by the Legislature of West Virginia:*

"Sec. 1. That all railroad corporations organized or doing business in this state under the laws or authority thereof shall be limited in their charges for the transportation of any person with ordinary baggage not exceeding one hundred pounds in weight, to the sum of two cents per mile, or fractional part of a mile, but the fare shall always be made the multiple of five nearest reached by multiplying the rate by the distance, and if for any one passenger the rates herein provided shall be less than five cents, the said sum of five cents may be charged as a minimum; children under twelve years of age shall be carried for one-half fare above prescribed; *provided,* that any passenger boarding a train at a station where tickets are sold, without having procured a ticket, may be charged an additional fare of ten cents, for which sum a rebate slip, redeemable in money, upon presentation to any ticket agent of the company, shall be issued and delivered to such passenger; and *provided, further,* that nothing in this act shall apply to any railroad in this state under fifty miles in length and not a part of, or under the control, management or operation of any other railroad, over fifty miles in length, operating wholly or in part in the state.

"Sec. 2. Any railroad company which shall charge, demand or receive any greater compensation for the transportation of any passenger than is authorized by this act, shall be fined for each offense not less than fifty dollars nor more than five hundred dollars; *provided,* that nothing contained in this act shall apply to electric lines and street railways owned or operated in this state.

"Sec. 3. All acts or parts of acts inconsistent herewith are hereby repealed."

**Statutes in Effect at Time Chapter 41 Was Enacted.**

For convenience, the acts regulating passenger rates on railroads in effect at the time of the passage of the act of 1907 quoted above are here inserted. It is printed in the Code of 1906 as part of chapter 54, and we give it as there printed:

Section 2471.

I. "That all railroad corporations organized or doing business in this State under the laws or authority thereof, shall be limited to the rates of compensation for the transportation of passengers, which are herein prescribed." (Acts 1872-3, c. 227).

Section 2472.

II. "All railroads in this State shall be classified according to the gross amount of their respective annual earnings per mile as follows:

Class A—Shall include railroads whose gross annual earnings, per mile, shall be ten thousand dollars, or more, and narrow gauge railroads whose gross annual earnings, per mile, shall be five thousand dollars or more.

Class B—Shall include railroads whose gross annual earnings, per mile, shall be eight thousand dollars, or any sum in excess thereof less than ten thousand dollars, and such narrow gauge railroads whose gross annual earnings, per mile, shall be four thousand dollars, or any sum in excess thereof less than five thousand dollars.

Class C—Shall include railroads whose gross annual earnings, per mile, shall be four thousand dollars, or any sum in excess thereof less than eight thousand dollars, and such narrow guage railroads whose gross annual earnings, per mile, shall be two thousand dollars, or any sum in excess thereof less than four thousand dollars.

Class D—Shall include railroads whose gross annual earnings, per mile, shall be any sum less than four thousand dollars, and narrow gauge railroads whose gross annual earnings, per mile, shall be any sum less than two thousand dollars." (Acts 1872-3, c. 227).

Section 2473.

III. "All railroad corporations, according to their classification herein furnished, shall be limited to compensation per mile, for the transportation of any person with ordinary baggage, not exceeding one hundred pounds in weight, as follows:

Class A—For any distance less than fifty miles, three and one-half cents per mile; for any distance exceeding fifty miles and less than one hundred miles, three and three-tenths cents per mile; for any distance exceeding one hundred miles and less than one hundred and fifty miles, three and one-fifth cents per mile; for any distance exceeding one hundred and fifty miles and less than two hundred miles, three and one-tenth cents per mile; for any distance exceeding two hundred and fifty miles, three cents per mile; for any distance exceeding two hundred and fifty miles and less than three hundred miles, two and nine-tenths cents per mile; for any distance exceeding three hundred miles and less than three hundred and fifty miles, two and four-fifths cents per mile; for any distance exceeding three hundred and fifty miles, two and seven-tenths per mile.

Class B—For any distance less than fifty miles, four cents per mile; for any distance exceeding fifty miles and less than one hundred miles, three and nine-tenths cents per mile; for any distance exceeding one hundred miles and less than one hundred and fifty miles, three and eight-tenths cents per mile; for any distance exceeding one hundred and fifty miles and less than two hundred miles, three and seven-tenths cents per mile; for any distance exceeding two hundred miles and less than two hundred and fifty miles, three and six-tenths cents per mile; for any distance exceeding two hundred and fifty miles and less than three hundred miles, three and one-half cents per mile; for any distance exceeding three hundred miles and less than three hundred and fifty miles, three and four-tenths cents per mile; for any distance exceeding three hundred and fifty miles, three and one-fourth cents per mile.

Class C—For any distance less than fifty miles, four and one-half cents per mile; for any distance exceeding fifty miles and less than one hundred miles, four and three-fifths cents per mile; for any distance exceeding one hundred miles and less than one hundred and fifty miles, four and three-tenths cents per mile; for any distance exceeding one hundred and fifty miles and less than two hundred miles, four and one-fifth cents per mile; for any distance exceeding two hundred miles, four cents per mile.

Class D—For any distance less than fifty miles, five cents per mile; for any distance exceeding fifty miles and less than one hundred miles, four and three-fourth cents per mile; for any distance exceeding one hundred

miles and less than one hundred and fifty miles, four and one-half cents per mile; for any distance exceeding one hundred and fifty miles and less than two hundred miles, four and one-fourth cents per mile; for any distance exceeding two hundred miles; four cents per mile: Provided, That no such corporation shall charge, demand or receive any greater compensation per mile for transportation of children of twelve years of age or under, than half the rates above prescribed: And provided also, a charge of ten cents may be added to the fare of any passenger when the same is paid upon the cars if a ticket might have been procured within a reasonable time before the departure of the train, and if the failure to procure a ticket was not caused by the ticket office being closed or without a sufficient supply of tickets, or other neglect of the company: And provided, further if for any one passenger the charge at the above rate would be less than twenty-five cents, the same may nevertheless be charged as a minimum." (Acts 1872-3, c. 227).

Section 2481.

XIII. "This act shall not be held to apply to any city or street railroad, or to any railroad whose entire length does not exceed six miles. But in no case, shall any railroad charge more freight or fare, than is authorized by its charter; and in no case, shall such charges be unreasonable." (Acts 1872-3, c. 227; Acts 1885, c. 42).

Section 2488.

I. "That any incorporated company operating by steam or horse power a railroad not exceeding thirty miles in length, may charge for the transportation of freight, not exceeding twenty cents per ton per mile." (Acts 1875, c. 37).

Section 2490.

I. "Any corporation operating a railroad wholly by horse power, may charge for transportation of passengers, with ordinary baggage not exceeding one hundred pounds in weight, eight cents per mile, and for children between six and twelve years of age, one-half that rate; and for freight two cents per hundred pounds per mile. Where at these rates, the charges would be less than twenty-five cents, that sum may be charged. But this act shall not apply to any street or suburban railroad." (Acts 1883, c. 23).

# CHESAPEAKE AND OHIO RAILWAY COMPANY *v.* CONLEY, ATTORNEY GENERAL OF THE STATE OF WEST VIRGINIA.

ERROR TO THE SUPREME COURT OF APPEALS OF THE STATE OF WEST VIRGINIA.

No. 111. Argued April 8, 1912.—Decided June 16, 1913.

Where the state court has held that the carrier is exempted from the operation of the penalty clause of a rate-making statute during prosecution by it in good faith of a suit to determine the constitutionality of such statute, the carrier cannot attack the validity of the statute on the ground of its penal provisions.

Classification in a rate-making statute of railroads less than fifty miles in length is not unreasonable and does not render the statute unconstitutional as violating the equal protection provision of the Fourteenth Amendment. *Dow* v. *Beidelman*, 125 U. S. 680.

As construed by the state court, the statute of West Virginia of 1907 is not unconstitutional because the classification of railroads under fifty miles in length only applies to such roads as are not under the control, management or operation of other railroads.

A classification excepting electric lines and street railways from a rail-

road rate statute is reasonable and proper and does not offend the equal protection clause of the Fourteenth Amendment. *Omaha & Council Bluffs Railway Co.* v. *Int. Comm. Comm.*, *ante*, p. 324.

*Minnesota Rate Cases*, *ante*, p. 352, followed to effect that a state statute prescribing rates exclusively for intrastate traffic is within the power of the State to enact.

THE facts, which involve the constitutionality of the two cent rate act of West Virginia of 1907, are stated in the opinion.

*Mr. F. B. Enslow*, with whom *Mr. H. Fitzpatrick*, *Mr. H. T. Wickham* and *Mr. W. E. Chilton* were on the brief, for plaintiff in error:

The West Virginia two-cent fare statute is unconstitutional because the penalties pronounced by the statute against any railway which shall fail to comply with the same are so excessive as to bring the act within the inhibition of Art. VIII of the Constitution; and, under the Fourteenth Amendment, the act deprives the plaintiff of its property without due process of law, and denies to it the equal protection of the law.

The entire act is unconstitutional, because the classification thereby made of the railways makes the act applicable to railroads of a certain class, and such classification as set out is unfair and unjust, and a mere arbitrary selection imposed by the legislature without any relation to the alleged purpose of the act and not based on any reasonable grounds.

The act is also unconstitutional because it necessarily imposes a burden upon the plaintiff as an interstate carrier, and denies it the right to transact and carry on interstate commerce free from the burdens and restrictions imposed by the West Virginia two-cent fare act.

The act is unconstitutional by reason of the classification by length of roads. Many States afflicted with the "two-cent fare fad of 1907" passed such statutes in 1907;

but every statute has general application, makes no discriminations, treats every railroad alike; and in the few cases where classifications are made, those classifications are founded upon a good reason, every road in each class is treated as are all others in that class, and there is no difficulty in assigning a railroad to its proper class from a physical examination of its property.

Alabama has a straight 2½¢ rate, and has not an exception in it. General Acts Ala. 1907, p. 104. Illinois has a straight two-cent rate, without an exception in it. Laws of Ill. 1907, p. 476. Pennsylvania has a straight two-cent rate, without an exception. Laws of Penn. 1907, p. 59. North Carolina has a straight 2¼¢ act which has the proviso that the Corporation Commission is authorized to permit "all independently owned and operated railroad companies in North Carolina, whose mileage of road in said State is sixty (60) miles or under, to charge a rate for transporting passengers not in excess of the present rate fixed and prescribed for said road." Public Laws of Nor. Car. Session 1907, c. 216, p. 250.

Iowa classifies railroads according to gross earnings per mile without any exception whatever with rates from 2¢ to 3¢. Laws of Iowa, 1907, c. 102.

Minnesota has a straight 2¢ rate with a half rate for children under 12 years of age. Laws of Minn. 1907, c. 97, p. 109.

Missouri divides railroads into four classes, to-wit: A, B, C and D, of which D includes all roads less than 45 miles in length, not owned, leased, controlled or occupied by any trunk line company or corporation. This classification includes and embraces every class of railroad in the State, and there is no chance, by construction or otherwise, to put one short railroad in one class to-day and in another to-morrow. The rate is fixed at 2¢ per mile for classes A, B and C; and at 4¢ per mile for class D. Laws of Mo. 1907, p. 171.

Nebraska has a straight 2¢ fare law applying to all railroads without exception. Laws of Neb. 1907, c. 92, p. 341.

North Dakota has a straight 2½¢ rate for distances exceeding six miles with a reduced rate for children, the only exception being that the act "shall not apply to the transportation of passengers within the boundaries of any city by street railways." Laws of N. D. 1907, c. 199, p. 327.

Ohio has a straight 2¢ per mile rate without any exception whatever. Laws of Ohio, 1906, p. 4.

South Carolina has a straight rate of 3¢. Laws of So. Car., 1902, § 2165. This act was subsequently amended by the single proviso that any railroad not over 5 miles in length may be permitted by the Railroad Commission to charge 5¢ per mile. See Acts of So. Car., 1908, No. 469, p. 1047.

South Dakota has a straight 2¢ rate without a single exception. Sess. Laws of So. Dak., 1909, c. 6, p. 8.

The act of West Virginia makes an unreasonable, arbitrary, unjust and totally indefensible classification of railroads, or it so exempts certain railroads as to make it repugnant to the rules laid down by this court. More, it is a classification which is one thing in one part of the statute and another thing in another part.

A railroad under fifty miles in length is excepted, provided it be not a part of, or under the control, management or operation of any other railroad over fifty miles in length. If a railroad should be exactly fifty miles in length it is in a peculiar situation.

An assessment, no matter how made, which adopts a different method and fixes a different rate for certain corporations which results in enormous disparity and discrimination denies equal protection of the laws. *Raymond* v. *Chicago Un. Traction Co.*, 207 U. S. 20.

While the State can classify, and may make a difference in classes, the basis upon which any classification is made is always subject to review by the courts. *Nicholas* v.

*Walter*, 37 Minnesota, 264; *Bluejacket* v. *Scherr*, 50 W. Va. 533; *Missouri* v. *Lewis*, 101 U. S. 22.

The Fourteenth Amendment requires the same means and methods to be applied impartially to all the constituents of a class, so that the law shall operate equally and uniformly upon all persons in similar circumstances. *Brannon*, 323; *Kentucky R. R. Tax Cases*, 115 U. S. 321; *Home Ins. Co.* v. *New York*, 134 U. S. 594; *Atchison* v. *Mathews*, 174 U. S. 105; *State* v. *Broodbelt*, 89 Maryland, 565; *New York* v. *Clearing House*, 179 U. S. 287; *Am. Sugar Co.* v. *Louisiana*, 179 U. S. 89; *Railway* v. *Mackey*, 127 U. S. 205; *Pembina* v. *Pennsylvania*, 125 U. S. 188.

Recognizing the right of classification of industries and occupations, it must nevertheless always be remembered that the equal protection of the laws is guaranteed, and that such equal protection is denied when upon one of two parties engaged in the same kind of business and under the same conditions burdens are cast which are not cast upon the other. *Richards* v. *Harmon*, 42 N. J. L. 435; *Cotting* v. *Kansas City Stock Yards Co.*, 183 U. S. 85; *Fertig* v. *Patton*, 88 Pa. St. 258; *Edmondson* v. *Herbrandson*, 14 L. R. A. 725; *State ex rel.* v. *Mitchell*, 31 Oh. St. 592; *People* v. *Chatauqua*, 43 N. Y. 10; *Smith* v. *L. & N. R. R.*, 75 Alabama, 449; *State ex rel.* v. *Ramsey Co.*, 48 Minnesota, 236.

The classification is based not only on length but also on control and management, and this renders it a denial of equal protection of the law.

*Dow* v. *Beidelman*, 125 U. S. 180, distinguished. And see Cooley, Con. Lim., 5th ed., 484; *State* v. *Haun*, 61 Kansas, 146; *Railway Co.* v. *Medaris*, 60 Kansas, 155; *Levalle* v. *Railroad*, 40 Minnesota, 249; *Deppe* v. *Railway Co.*, 36 Iowa, 55; *Ballard* v. *Cotton Oil Co.*, 81 Mississippi, 507; *Bedford Quarries Co.* v. *Bough*, 80 N. E. Rep. 529.

An exception to the statute cannot take one business and favor it when other corporations and other individ-

uals, doing the same kind of business, are not so favored, nor can the statute permit a small corporation to engage in the same business with a larger corporation, the latter having burdens which the former has not, or the former having privileges which the latter has not. *Connolly* v. *Sewer Pipe Co.*, 184 U. S. 558; *State* v. *Petroleum Co.*, 58 W. Va. 109; *Re Grice*, 79 Fed. Rep. 628; *Cotting* v. *Kansas City Stock Yards Co.*, 183 U. S. 85.

A state railroad statute which imposes such excessive penalties that the parties affected are deterred from testing its validity in the courts, denies the carrier the equal protection of the law, without regard to the question of insufficiency of the rates prescribed. *Ex parte Young*, 209 U. S. 123; *Willcox* v. *Consol. Gas Co.*, 212 U. S. 19.

While the length of the road may furnish in some instances a proper basis for classification, such classification must be called for by facts justifying it, and if it has the effect of denying equal protection to parties engaged in the same kind of business, and is so worded that it applies to some corporations in the class, and excludes others, it is invalid. *Kentucky R. R. Tax Cases*, 115 U. S. 321; *Cotting* v. *Kansas City Stock Yards*, 183 U. S. 79; *St. Louis Coal Co.* v. *Illinois*, 185 U. S. 203; *Louis. & Nash. R. R. Co.* v. *Melton*, 218 U. S. 36; *Mo., Kans. & Tex. Ry. Co.* v. *May*, 194 U. S. 267; *Ozan Lumber Co.* v. *Union National Bank*, 207 U. S. 251; *McLean* v. *Arkansas*, 211 U. S. 539; *N. Y., N. H. & H. R. R. Co.* v. *New York*, 165 U. S. 628; *Chi., R. I. & Pac. Ry. Co.* v. *Arkansas*, 219 U. S. 453, distinguished; *Heath & Milligan Mfg. Co.* v. *Worst*, 207 U. S. 338; *Engel* v. *O'Malley*, 219 U. S. 128, are all inapplicable to this case.

The Two-Cent Fare Act of West Virginia imposes burdens and restrictions upon interstate commerce, and is for that reason also invalid.

Congress having, under authority of the Constitution, prescribed rates and regulations governing the charges of interstate carriers, no State can impose burdens upon or

enact statutes that actually do conflict with and nullify the regulations of the Interstate Commerce Commission. *Hall* v. *DeCuir*, 95 U. S. 489; *Gulf, Colo. & Santa Fe Ry. Co.* v. *Hefley*, 158 U. S. 99; *Wabash &c. Ry.* v. *Illinois*, 118 U. S. 557; *Cleveland &c. Ry.* v. *Illinois*, 177 U. S. 514; *Employers' Liability Cases*, 207 U. S. 463.

The statute, by reason of the extreme penalties pronounced, is in violation of the constitution of West Virginia.

It makes a distinction that should not be upheld; and no case passed upon by this court has ever sustained such an arbitrary statute as the one in question.

It is a clear effort on the part of the legislature of West Virginia to make the statute applicable to the trunk lines engaged in interstate commerce, and thereby affect and control the rates published and approved under the regulation of the Interstate Commerce Commission.

*Mr. William G. Conley*, Attorney General of West Virginia, for defendants in error.

Mr. Justice Hughes delivered the opinion of the court.

This suit was brought by the Chesapeake & Ohio Railway Company in the Circuit Court for Kanawha County, West Virginia, against William G. Conley, Attorney General of the State of West Virginia, and the prosecuting attorneys of several counties in the State, to enjoin the enforcement of the act of the legislature of West Virginia passed February 24, 1907 (Acts, 1907, chapter 41, p. 226), fixing the maximum fare for passengers on railroads, as described, at two cents a mile.

The state court sustained the act and this writ of error is brought.

The act provides:

"Sec. 1. That all railroad corporations organized or

doing business in this state under the laws or authority thereof shall be limited in their charges for the transportation of any person with ordinary baggage, not exceeding one hundred pounds in weight, to the sum of two cents per mile, or fractional part of a mile, but the fare shall always be made the multiple of five nearest reached by multiplying the rate by the distance, and if for any one passenger the rates herein provided shall be less than five cents, the said sum of five cents may be charged as a minimum; children under twelve years of age shall be carried for one-half fare above prescribed; *provided*, that any passenger boarding a train at a station where tickets are sold, without having procured a ticket, may be charged an additional fare of ten cents, for which sum a rebate slip, redeemable in money, upon presentation to any ticket agent of the company, shall be issued and delivered to such passenger; and *provided, further*, that nothing in this act shall apply to any railroad in this state under fifty miles in length and not a part of, or under the control, management or operation of any other railroad, over fifty miles in length, operated wholly or in part in the state.

"SEC. 2. Any railroad company which shall charge, demand or receive any greater compensation for the transportation of any passenger than is authorized by this act, shall be fined for each offence not less than fifty dollars nor more than five hundred dollars; *provided*, that nothing contained in this act shall apply to electric lines and street railways owned or operated in this state."

The questions presented are thus stated by the plaintiff in error:

"First: The statute in question is unconstitutional because of the fact that the penalties pronounced by the statute against any railway which shall fail to comply with the same, are so excessive as to bring the act within the inhibition of Article Eight of the Constitution of the

United States, and under the Fourteenth Amendment to the Constitution of the United States deprives the plaintiff of its property without due process of law, and denies to it the equal protection of the law.

"Second: The entire act is unconstitutional, because the classification thereby made of the railways makes the act applicable to certain railroads of a certain class, and such classification as set out is unfair and unjust, and a mere arbitrary selection imposed by the Legislature without any relation to the alleged purpose of the act, and not based on any reasonable grounds.

"Third: Because the act necessarily imposes a burden upon the plaintiff as an interstate carrier, and denies it the right to transact and carry on interstate commerce free from the burdens and restrictions imposed by the West Virginia two cent rate act."

While the plaintiff in error was entitled to a fair opportunity to test the constitutional validity of the prescribed rate, and penal provisions operating to preclude such an opportunity would be invalid (*Ex parte Young*, 209 U. S. 123), it is clear that the provisions for penalties of the statute in question, aside from their separable character, are not open to this objection, in the light of the construction placed upon them by the state court. In construing the act, the Supreme Court of Appeals of West Virginia held:

"By the institution of a suit to determine whether such a statute is confiscatory in its operation in a particular case, such corporation alters its status from that of a mere corporation engaged in the public service, to that of a contestant of the legislative claim of right to take its property without due process of law; and, in the absence of expression of intent to the contrary, it is presumed the legislature did not intend to affect, or interfere with, the assumption or maintenance of such status, nor to legislate upon the subject of such remedy; and the penal clause of

such a statute, silent on the subject of remedy, has no application, while suit is pending, in good faith, for the determination of such question. . . . By the application of these rules and principles, a railroad company is excepted from the operation of the penalty clause of chapter 41 of the Acts of 1907, during the prosecution by it, in good faith, of a suit to determine whether said statute is confiscatory in its operation and effect, as applied to such company." *Coal & Coke Railway Co.* v. *Conley and Avis*, 67 W. Va. 129, 133, 134.

Under this ruling, it does not appear that the company is in a position to attack the validity of the act by reason of its penal provisions. It has had its opportunity in court, and if the act be otherwise valid it may avoid penalties hereafter by complying with it. Further, as was said in *Western Union Telegraph Co.* v. *Richmond*, 224 U. S. 160, 172: "If an oppressive application of them should be attempted, it will be time enough then for the appellant to file its bill."

Nor can it be said that the classification of the act is an unreasonable or arbitrary one. In *Dow* v. *Beidelman*, 125 U. S. 680, the statute under consideration classified railroads with respect to passenger fares, as follows: "On lines of railroad fifteen miles or less in length, eight cents per mile. On lines over fifteen miles in length, and less than seventy-five miles in length, five cents. On lines over seventy-five miles in length, three cents per mile." The court in sustaining the statute said: "The legislature, in the exercise of its power of regulating fares and freights, may classify the railroads according to the amount of the business which they have done or appear likely to do. Whether the classification shall be according to the amount of passengers and freight carried, or of gross or net earnings, during a previous year, or according to the simpler and more constant test of the length of the line of the railroad, is a matter within the discretion of the

legislature. If the same rule is applied to all railroads of the same class, there is no violation of the constitutional provision securing to all the equal protection of the laws." (p. 691.)

Again, in *Chicago, Rock Island & Pacific Railway Co.* v. *Arkansas*, 219 U. S. 453, the court sustained the statute of that State, which, in providing for the number of men to be employed in the operation of freight trains, excluded from its application railroads less than fifty miles in length. The principles governing the decision of a question of this sort have been so frequently stated that repetition is unnecessary. *Magoun* v. *Illinois T. & S. Bank*, 170 U. S. 283, 294; *Louisville & Nashville R. R. Co.* v. *Melton*, 218 U. S. 36, 52–55; *Engel* v. *O'Malley*, 219 U. S. 128; *Lindsley* v. *Natural Carbonic Gas Company*, 220 U. S. 61, 78; *Mutual Loan Co.* v. *Martel*, 222 U. S. 225, 232; *Chicago Dock* v. *Fraley*, 228 U. S. 680.

It is urged, however, that "control, management or operation" is made the basis of classification for rate purposes, so that, if a railroad under fifty miles in length be controlled by a railroad of greater length, it would be taken out of the exception although operated wholly independently and not in connection with the longer line. This contention is fully met by the construction which the state court has given to the statute. Upon this point that court said that the meaning of the words "under the control, management or operation" "is to be ascertained from the connection in which they are used, the act in which they are found, its context, and the mass of legislation of which they form a part. In form, the expressions are alternative, but, in meaning, they are appositive, signifying the same as the words 'part of.' . . . The suggestion that ownership or control of one railroad by another, when they are not connected and operated together, nor susceptible of such connection and operation, makes them one within the meaning of the act, is like-

wise contrary to the spirit and beyond the scope thereof. Such an interpretation is not within its reason or purpose, and, therefore, not within its meaning. The legislature must be regarded as having passed the act, in view of existing conditions and methods of railroad operation, and with the intent that it should operate in harmony with the spirit and general principles of existing railroad rate legislation, except in so far as the contrary is expressed in terms or by necessary implication. There is not a word here signifying any intent to depart from the general principle embodied in the act of 1873, concerning the entity of a railroad for the purposes of the act. It made into one only such railroads as were operated 'in connection' with one another. Intent to change this settled policy must rest upon something more, in an amendatory act, than mere inference, surmise or unnecessary implication." *Coal & Coke Railway Co.* v. *Conley and Avis*, 67 W. Va. 129, 177, 178, 179.

The exception of "electric lines and street railways" is also made the ground of criticism, but this classification rests upon reasonable and familiar distinctions, long recognized as proper in railroad legislation. *Omaha & Council Bluffs Street Railway Co.* v. *Interstate Commerce Commission*, *ante*, p. 324.

The final objection to the statute is that it constitutes an unconstitutional interference with interstate commerce. It must be regarded, however, as prescribing rates exclusively for intrastate traffic, and, as thus construed, it was within the power of the State to enact. The questions presented are substantially the same as those which were considered in the *Minnesota Rate Cases*, *ante*, p. 352.

*Judgment affirmed.*